FILE COPY

SEP 23 1948

CHARLES ELMORE ... CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No. 295

CHARLES C. DIGGS,
Petitioner,

vs.

THE PEOPLE OF THE STATE OF MICHIGAN,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN AND BRIEF IN SUPPORT THEREOF

GEORGE STONE,
Attorney for Petitioner,
2163 Penobscot Building,
Detroit 26, Michigan.

LLOYD A. LOOMIS,
WILLIAM L. COLDEN,
508 Tobin Building,
Detroit 26, Michigan,
Of Counsel.

Interstate Brief & Record Co., 170 East Larned St., Detroit 26, Michigan

SUBJECT INDEX

	Page
Petition for Writ of Certiorari to the Supreme Court of the State of Michigan	1-6
I. Statement of the Case	2-4
II. Questions Presented	4
III. Reasons for Allowance of the Writ	5
IV. Prayer	5-6
Brief in Support of Petition for Writ of Certiori	7-20
I. Opinions of the Courts Below	7
II. Jurisdiction	7
III. Statement of Case	7
IV. Specifications of Error and Summary of Argument	8
V. Argument	9-20
A. Petitioner was convicted without a fair trial and due process of law	9-17
B. The giving of a bribe and the taking of a bribe do not constitute a conspiracy under the laws of the State of Michigan	18-20
Conclusion	20
Appendix "A"	21-23
Appendix "B"	23-25

INDEX TO AUTHORITIES CITED

	Page
Adamson v. California, 332 U. S. 46, 53	9
August v. United States, (C. C. A. 8, 1918) 257 Fed. 388	12
Berger v. United States, 295 U. S. 78	12
Betts v. Brady, 316 U. S. 455, 462	9
Bollenbach v. United States, 326 U. S. 607, 612	17
Davis v. People, 22 Colo. 1	20
DeMeerleer v. Michigan, 329 U. S. 664	10
Ex parte Kramer, 61 Nev. 174, app. dis. 316 U. S. 646	10
Gebardi v. United States, 287 U. S. 112	19
In re Oliver, 333 U. S. 257	10
In re Resler, 115 Nebr. 335	20
Ippolito v. U. S. (C. C. A. 6, 1940) 108 F. (2d) 668	12
Levine v. Oklahoma, 322 U. S. 496, 605	9
Mooney v. Holohan, 294 U. S. 103, 112	11
Powell v. Alabama, 287 U. S. 45	10, 12
Pierce v. United States, (C. C. A. 6, 1936) 86 F. (2d) 949	12
People v. DeLano, 318 Mich. 557	15
People v. Richardson, 224 Mich. 66	17
People v. Wettengel, 98 Colo. 193, 104 A. L. R. 1423	19
Richardson v. United States, (C. C. A. 6, 1945) 150 Fed. (2d) 58, 64	15
Skuy v. U. S. (C. C. A. 8, 1919) 261 Fed. 216	18
State v. Bell, 205 N. C. 225	20
State v. Law, 189 Iowa 910, 11 A. L. R. 194	19
Stewart v. Michigan, 232 U. S. 665	20
United States v. Dietrich (C. C., 1904), 126 Fed. 664	19
United States v. N. Y. C. R. R. Co. (C. C., 1906), 146 Fed. 298	19
United States v. Sager (C. C. A. 2, 1931), 49 F. (2d) 725	19
Voight v. Webb (D. C. Wash., 1942) 47 F. Supp. 743	10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No..... .....

CHARLES C. DIGGS,
Petitioner,

vs.

THE PEOPLE OF THE STATE OF MICHIGAN,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner Charles C. Diggs prays for the issuance of a writ of certiorari to review the decisions of the Supreme Court of the State of Michigan in affirming, on May 18, 1948, the judgment of the Circuit Court for the County of Ingham in the State of Michigan and in denying, on June 29, 1948, petitioner's request for rehearing in connection with certain criminal proceedings.

I.

STATEMENT OF THE CASE

(Unless otherwise clearly shown by context, figures in parentheses refer to pages of the printed record)

Petitioner, jointly with one Logie, was convicted in the Circuit Court for Ingham County, Michigan, upon an information* charging them with conspiring corruptly to affect and influence the legislature of the State of Michigan with respect to House Bill No. 22, which related to the regulation and licensing of racing meets (302). This bill, after passing the State House of Representatives, was transmitted to the State Senate where it was referred to the Committee on State Affairs. At the time petitioner Diggs and his co-defendant Logie were State senators and members of this committee. Its chairman was Chester M. Howell. On Howell's motion all members of the State Affairs Committee voted indefinitely to postpone action on this bill (303).

At the trial Howell, the chief witness for the people, testified under a grant of immunity that he had been given $3,000 by one Constantine Daniels for the purpose of influencing votes on this bill. He stated that Daniels told him he wanted $1,000 of this amount to go to Logie and $250 to petitioner Diggs. Howell claimed that he paid Logie $500 on one occasion and $300 on another and gave Diggs $150, telling them that there would be more later. He admitted that he deliberately cheated both of them out of the balance of the money (303).

The proofs against petitioner were extremely weak, depending solely upon the testimony of the self-confessed

---

*This charge was the outgrowth of an investigation by a One-Man Grand Jury such as was involved in *In re Oliver*, 333 U. S. 257.

cheat* and co-conspirator Howell. The entire proof against petitioner was Howell's statement that he asked petitioner on the floor of the Senate to kill the racing bill and he would get $250 (41), and that he later gave him $150 (48). Howell never claimed any further contact with petitioner or any further participation by petitioner in the scheme or that petitioner ever asked him about the matter. Howell admitted on cross-examination that he never told either Logie or petitioner of any action that the other was contributing toward the killing of the bill (94).

Petitioner himself under oath completely denied any part in the scheme or that he agreed to kill the bill or was paid any money by Howell to influence his vote (108-10).

The case was tried in the circuit court by a special prosecutor, Kim Sigler, for the people.** Throughout the entire trial, this special prosecutor persisted in a continuous, studied and calculated course of disparaging and belittling remarks directed against petitioner and his counsel as well as in a series of innuendos implying that they were withholding the truth from the jury. All of this was done for the sole purpose of prejudicing the jury against the accused and preventing a fair trial. This same special prosecutor had been extremely successful with such tactics in several other trials*** arising out of the same

---

*Howell also admitted his participation in the conspiracy and that he had pleaded guilty to another indictment (95) on which he had not yet been sentenced (75).

**Now the Governor of the State of Michigan.

***Particularly *People v. DeLano*, 318 Mich. 557, cert. den. 334 U. S. 818, referred to *infra*.

grand jury investigations, and from which he received great publicity.*

The inevitable result of such misconduct by the prosecutor, sanctioned as it was by the trial court, was the denial of a fair hearing and the finding of a verdict of guilty by the jury (230). Petitioner was immediately sentenced to 4 to 5 years in the State prison (250).

Motion for new trial was timely filed (252) urging *in extenso* the prejudicial misconduct of the special prosecutor, but the motion was denied. On appeal to the Supreme Court of Michigan (the highest court of the state) these same objections, among others, were pressed upon that court (286-9), were considered by it, and overruled (303-4). Timely application for rehearing to that court again urging the same objections and the denial of due process and a fair hearing (313) was also denied (334).

On July 2, 1948, on petitioner's application, a stay of proceedings was granted by the state Supreme Court for a period of 30 days pending this application for writ of certiorari (335). Subsequently on July 27, 1948, this Court granted a further stay until at least September 27, 1948.

II.

QUESTIONS PRESENTED

A. Did the misconduct of the special prosecutor result in denial to petitioner of the fair hearing and due process of law commanded by the 14th amendment to the United States Constitution?

B. Was the criminal conduct charged in the information a crime under the laws of the State of Michigan?**

---

*Mr. Sigler was subsequently elected Governor of the State of Michigan, and took office January 1, 1947.

**This point was raised on appeal to the state supreme court by assignment of error number 1 (286) but was completely ignored by that court.

III.

REASONS FOR ALLOWANCE OF THE WRIT

A. The state Supreme Court has considered and denied petitioner's claim to a fair hearing and due process of law under section 1 of the 14th amendment to the United States Constitution.

B. The state supreme court has decided herein a federal question of substance and its decision is not in accord with the decisions of this and other courts on the transgressions of a prosecutor resulting in denial of due process of law under that amendment.

C. The state supreme court has affirmed a conviction for a crime which does not exist under the laws of the State of Michigan.

D. The questions involved are of general public importance affecting fundamental rights in jury trials, particularly the right to protection against the overbearing conduct of the sovereign state's representative—the special prosecutor.

IV.

PRAYER

Wherefore, petitioner, Charles C. Diggs, prays that a writ of certiorari issue under the seal of this Court directed to the Supreme Court of Michigan commanding the said court to certify and send to this court a full and complete transcript of the record and the proceedings of said court had in this cause numbered and entitled on its docket No. 43,270, The People of the State of Michigan, Plaintiff-Appellee v. Charles C. Diggs, Respondent and

Appellant, to the end that this cause may be reviewed and determined by this court and that the judgment of the said Supreme Court of Michigan be reversed and for such further relief as this court may deem proper.

GEORGE STONE,
Attorney for Petitioner,
2163 Penobscot Building,
Detroit 26, Michigan.

LLOYD A. LOOMIS,
WILLIAM L. COLDEN,
508 Tobin Building,
Detroit 26, Michigan,
Of Counsel.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I.

OPINIONS OF THE COURTS BELOW

The opinion of the Supreme Court of Michigan is reported in 321 Mich. 303.

The opinion of the trial court in denying the motion for new trial is unreported, but appears in the printed record, pp. 265-6.

II.

JURISDICTION

The jurisdiction of this court is invoked under section 237 (b) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C., Section 344), and under sections 1257(3) and 2101(c) of Title 28, U. S. C. A., Judiciary and Judicial Procedure, effective September 1, 1948.

III.

STATEMENT OF CASE

A summary statement of the case has already been made in the Petition for a Writ of Certiorari under heading I, which is hereby adopted and made a part of this brief.

IV.

SPECIFICATIONS OF ERROR AND SUMMARY OF ARGUMENT

A. The state supreme court erred in holding that the special prosecutor's misconduct throughout the trial did not deprive petitioner of a fair trial and due process of law guaranteed him by section 1 of the 14th Amendment to the United States Constitution.

B. The state supreme court erred in holding that the giving of a bribe and the taking of a bribe can constitute a conspiracy at common law, and that the acts charged against petitioner constituted a crime under the laws of the State of Michigan.

V.

ARGUMENT

A.

PETITIONER WAS CONVICTED WITHOUT A FAIR TRIAL AND DUE PROCESS OF LAW

The Constitution of the United States in amendments 5 and 14 expressly declares that no man shall be convicted without "due process of law." This has been repeatedly held to be tantamount to a "fair trial."

> *Adamson v. California*, 332 U. S. 46, 53;
> *Levine v. Oklahoma*, 322 U. S. 496, 605;
> *Betts v. Brady*, 316 U. S. 455, 462.

As stated by Justice Frankfurter in the *Adamson* case such due process requires that the proceedings accord with "those canons of decency and fairness which express the notions of justice of English-speaking peoples even towards those charged with the most heinous offenses" (332 U. S. 67-8).

What constitutes a "fair trial" and a compliance with those standards of "decency and fairness" cannot be defined beforehand but must be judged in the light of the entire proceedings in the then prevailing circumstances and the legal and social philosophy of the times. As said by Frankfurter J., in the *Adamson* case:

> "These standards of justice are not authoritatively formulated anywhere as though they were prescriptions in a pharmacopoeia." (332 U. S. 68.)

The guaranty thus provided is that every trial shall be conducted on fundamental principles of liberty and

justice. Woven into the very warp and woof of the due process philosophy is the principle of fair play.

Voight v. Webb (D. C. Wash., 1942) 47 F. Supp. 743.

Out of the multitudinous examples of what constitutes due process of law, there has crystallized by judicial exclusion and inclusion the principle that the hearing must be fair, that the accused be confronted with the evidence against him and that he be given an opportunity to defend;

In re Oliver, 333 U. S. 257,

and that he shall have, in the absence of intelligent waiver, representation by counsel.

In re Oliver, supra;
DeMeerleer v. Michigan, 329 U. S. 664.

Such representation must be real and not merely *pro forma;* it must be effective.

Powell v. Alabama, 287 U. S. 45;
Ex parte Kramer, 61 Nev. 174, app. dis. 316 U. S. 646.

Representation by incompetent counsel or the emasculation of such representation by a precalculated plan of the prosecution belittling and disparaging such counsel, in the presence of the jury, sanctioned by the court, is equally a denial of a fair trial. Degradation of defense counsel is in effect a prejudicial limitation of the rights of accused. As stated in *Powell v. Alabama,* 287 U. S. at p. 69:

> "If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by or appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense."

That the conduct of a prosecutor may constitute State action within the purview of the 14th amendment is no longer open to doubt.

Mooney v. Holohan, 294 U. S. 103, 112.

Examination of the record in the present case will show that the conduct of the special prosecutor violated every principle of fair trial, fair play, and decency, as well as precluded a real and fair representation of petitioner by his counsel. This special prosecutor, who, incidentally, is now Governor of the State of Michigan, from the beginning of the trial, without provocation of any sort, made continuous prejudicial and derogatory remarks directed at the accused and their counsel in the presence of the jury, which remarks were calculated to and did bias the jurors in the consideration of the case and resulted in a miscarriage of justice. It was part of a plan conceived in advance of the trial and carried through to a successful conclusion as it had been in previous trials before. While some of the remarks were in themselves not particularly vicious yet the cumulative effect of all of those remarks together with the condoning attitude of the trial judge, the overbearing demeanor of the prosecutor and the humiliation of both the accused and their counsel undoubtedly resulted in an indelible effect upon the minds of the jury to petitioner's prejudice.

The state supreme court apparently proceeded on the theory that the accused were guilty and that, therefore, no

misconduct of the special prosecutor, no matter how reprehensible, should interfere with the affirmation of the conviction. This court has expressly stated in *Powell v. Alabama*, 287 U. S. 45, that no matter how guilty the defendants may be upon due inquiry they were, until convicted, presumed to be innocent and that it was "the duty of the court having their cases in charge to see that they were denied no incident of a fair trial."

We have gathered together some of the vicious and overbearing remarks and innuendos of the prosecutor in Appendix A to which we respectfully refer the court.

Both the Solicitor-General and the state supreme court have pointed out that in many instances no objections were made by counsel for petitioner or that some curative remark was made by the trial judge. While the opinion of that court holds the remarks to be not prejudicial, implicit in the ruling is the thought that objections were not made or that curative instructions were given. The state supreme court in reaching this conclusion committed grave error. The test is not the mechanical procedure of objection and cure, but the total effect upon the minds of the jury of the repeated and persistent misconduct of the prosecutor.

Ippolito v. U. S. (C. C. A. 6, 1940) 108 F. (2d) 668;

Pierce v. United States, (C. C. A. 6, 1936) 86 F. (2d) 949;

August v. United States, (C. C. A. 8, 1918) 257 Fed. 388.

Particularly in point is the leading case of *Berger v. United States,* 295 U. S. 78, where this court in no uncertain terms reversed a conviction because of the misconduct of the prosecutor.

The cases cited hold that the governing principle is what is the effect of the misconduct viewed as a whole upon the jury regardless of technical objections and attempted curative rulings by the trial judge. Equally controlling and fundamental in these cases is the nature of the case against the accused, whether it be weak or strong. What may not be prejudicial in the face of overwhelming proof of guilt may, in a weak case where the proofs are in serious dispute, sufficiently prejudice the jury to tip the balance against the accused. In the latter circumstance, prejudice must be assumed. We refer again to the case of *Berger v. United States, supra,* where this court based its reversal upon the very fact that the proof of guilt depending as it did upon the testimony of an accomplice, was extremely weak.

> "The court below said that the case against Berger was not strong; and from a careful examination of the record we agree. Indeed, the case against Berger, who was convicted only of conspiracy and not of any substantive offense as were the other defendants, we think may properly be characterized as weak—depending, as it did, upon the testimony of Katz, an accomplice with a long criminal record.
>
> In these circumstances prejudice to the cause of the accused is so highly probable that we are not justified in assuming its non-existence. If the case against Berger had been strong, or, as some courts have said, the evidence of his guilt 'overwhelming,' a different conclusion might be reached. Compare *Fitter v. United States,* 258 Fed. 567, 573; *Johnson v. United States,* 215 Fed. 679, 685; *People v. Malkin,* 250 N. Y. 185, 201-202; 164 N. E. 900; *Iowa v. Roscum,* 119 Iowa 330, 333, 93 N. W. 295. Moreover, we have not here a case where the misconduct of the prosecuting attorney was slight or confined to a single instance, but one where such

misconduct was pronounced and persistent, with a probable cumulative effect upon the jury which cannot be disregarded as inconsequential. A new trial must be awarded. Compare *N. Y. Central R. Co. v. Johnson*, 279 U. S. 310, 316-318" (88-89).

As previously stated, *the only evidence against petitioner was the statement of the self-confessed cheat and co-conspirator Howell that he asked petitioner to kill the racing bill and he would get $250 and that he later gave him $150.* There was no claim of any further contact with petitioner or of any further participation by him in the scheme, or that petitioner ever asked him about the matter. *Petitioner denied completely under oath that he ever had any part in the scheme or that he agreed to kill the bill, or that he was paid any money to influence his vote.**

It would be almost impossible to conceive a weaker case for the prosecution. How can it be said then that the misconduct of the special prosecutor was not prejudicial to the accused? In such circumstances the probability of its prejudicial effect upon the jury was so inevitable that injury to the accused must be assumed.

The fact that Howell's testimony inculpating petitioner might have been sufficient to raise a question of fact for the jury to decide is not the answer. Whether or not this was so he was still entitled to a fair trial and con-

---

*Contrast the proofs against Diggs with those against the co-defendant Logie. Howell said that he made a deal with Logie, went to Grand Rapids, got the $3,000 and came back on Monday, the 26th, met Logie, asked him to come to his room, which he did, gave him $500 (47); that he met Logie later at an EMTA outing, asked him to his room and gave him another $300 (53). Logie's presence at the outing was corroborated by pictures taken at the outing of him (Logie) and others (50). Logie had also paid Howell on two previous occasions to kill certain bills (96-7).

sideration by the jury of the evidence divorced from prejudicial misconduct of prosecutor.

Richardson v. United States, (C. C. A. 6, 1945) 150 Fed. (2d) 58, 64;
Cf. Powell v. Alabama, supra.

The state supreme court in its opinion affirming the conviction of petitioner unjustifiably relied upon the earlier case of *People v. DeLano,* 318 Mich. 557. That case furnished no precedent for the present case.

1. In the DeLano case the proofs incriminating the defendant were, unlike those in the instant case, quite strong. Williams, the lobbyist, there testified that he met Senator DeLano, had a talk with him about getting his bill out of the state affairs committee and that DeLano told him it would cost him $2,500. He talked with DeLano later in his room at the hotel and saw him every day. In the room he gave $2,000 in cash to DeLano who counted it out by sorting it on the bed like a deck of cards according to the denomination of the bills. DeLano then made a notation in a little black book which he took out of his vest pocket. Williams told him he was broke, so DeLano gave him back a $100.00, and consequently DeLano received only $1,900.00 of the $2,500. They saw each other daily 'til the end of the session, DeLano assuring Williams that he was doing the best he could to get the bill out of the committee. After the session was over, Williams and Dr. Grabow of Kalamazoo drove out to DeLano's farm. There DeLano told them that he "had been going through his little book" and found Williams owed him money and he wanted it. Unlike Diggs, who testified and denied the charge and testimony against him, ***DeLano did not take the stand in his own behalf.***

It might well be said, therefore, as the state supreme court did, that the misconduct of the prosecutor in that case could not have affected the result in the face of such complete incrimination of the defendant. But in the case at bar, petitioners' implication is by the most tenuous of threads—so slim, indeed, that anything less would have to be called nothing. The misconduct of the prosecutor, the disparaging, belittling, or insulting remarks directed against petitioner and his counsel and the innuendos implying concealment of the truth, could very well have overbalanced the otherwise delicate equilibrium of the proofs. In such circumstances, prejudice to the cause of petitioner must be assumed. *Berger v. United States, supra.*

2. It was also pointed out by the state supreme court in its opinion that, as in the *DeLano* case, the remarks made were only the usual occurrences in the heat of the trial. But we have carefully examined the remarks and conduct of special prosecutor in both cases* and find such a striking similarity in the manner and method used and in the remarks made as to lead to only one conclusion—this was a precalculated plan of the prosecutor to try his case by insulting and belittling his opponents and by implying to the jury that they were concealing the truth. It can not be said that here the prosecutor was acting under the stress and strain of the trial. His remarks were stock to be used over and over again. By way of illustration we have noted some of the remarks made by him in both cases in tabular form in Appendix B so that his premeditated course of misconduct becomes at once self-evident.

---

*The same special prosecutor, of course, tried the present case after he tried the DeLano case.

The remarks of the prosecutor thus set forth in Appendices A and B are by no means exhaustive. They suffice to show however, that the special prosecutor, fortified by the favorable publicity and by what he "got away with" in the *DeLano* trial, carried the same plan of attack through petitioner's trial. He was overwhelmingly successful in his ridiculing and belittling of petitioner's counsel, implying their concealment and distortion of the truth and in prejudicing the jury against them. This misconduct on the part of the prosecutor was undoubtedly even more effective because of the lukewarm attitude of the trial court and the failure of both that court and the state supreme court to apply effective corrective measures.

It is especially to be noted as pointed out in *Berger v. United States, supra,* and by the state supreme court in *People v. Richardson,* 224 Mich. 66, that the prosecutor is a man of high standing in the community and that his remarks are of great influence upon the jury. This applies with even greater force to the present case because the peoplee here were represented by a *special* prosecutor *especially* chosen by a grand jury to unearth and punish wholesale crime. *Ipso facto,* he was a man of outstanding integrity and importance. His slightest suggestion was implicitly followed by the jury.

The trial court made little or no effort to control the prosecutor, but permitted him to run roughshod through the trial. Inevitably the jury must have felt that his behavior had the sanction of the court and not only was he always in the right, but defense counsel were always in the wrong. Jurors are ever watchful of every inclination of the trial judge and are greatly influenced thereby.

Bollenbach v. United States, 326 U. S. 607, 612.

We submit that the petitioner was denied the rudiments of a fair trial and due process of law in violation of the 14th amendment to the United States Constitution.

B.

THE GIVING OF A BRIBE AND THE TAKING OF A BRIBE DO NOT CONSTITUTE A CONSPIRACY UNDER THE LAWS OF THE STATE OF MICHIGAN

This point was presented to the state supreme court for its consideration by petitioner's assignment of error number (1) (286), but was not passed upon by that court. However, we believe it to be of such overwhelming importance to the rights of petitioner that this court may well consider it under the rule laid down in *Skuy v. United States* (C. C. A. 8, 1919), 261 Fed. 316 (syllabus), that "radical fault in the trial of a crime involving the liberty of defendant will be noticed and corrected by the reviewing court, although there be no proper objection, exception, or assignment."

Conspiracy law in the State of Michigan is based upon Section 505 of the Michigan Penal Code (section 28.773, Mich. Stat. Ann.) which provides:

> "Any person who shall commit any indictable offense at the common law, for the punishment of which no provision is expressly made by any statute of this state, shall be guilty of a felony * * *."

The so-called "Wharton Rule" of conspiracy law has been adopted by the courts of the United States and of every state where the question has been raised. Under this rule there can be no conspiracy to commit a crime where a concert of action and plurality of agents are necessary elements of the substantive offense for the commission of which a conspiracy is alleged to have been formed. The conspiracy charged in the present case was that petitioner and others conspired corruptly to effect and influence legislation by giving and receiving of bribes. To such a charge the rule that there can be no conspiracy where a

concert of action is required is particularly applicable and many cases have so held.

United States v. Dietrich (C. C., 1904), 126 Fed. 664;
United States v. Sager (C. C. A. 2, 1931), 49 F. (2d) 725;
United States v. N. Y. C. R. R. Co. (C. C., 1906), 146 Fed. 298;
People v. Wettengel, 98 Colo. 193, 104 A. L. R. 1423;
State v. Law, 189 Iowa 910, 11 A. L. R. 194.

See also *Gebardi v. United States,* 287 U. S. 112.

The conviction charged against petitioner was neither a common law conspiracy nor a statutory conspiracy.

Analysis of section 505 of the Michigan Penal Code upon which the information against petitioner was based, undoubtedly strengthens our contention that the Wharton Rule must be applicable. That section, by its very terms, provides that any person who shall commit any indictable offense "for the punishment of which no provision is expressly made by any statute of this state" shall be guilty, etc. If then the acts of petitioner were such as to be punishable by any statute of the State of Michigan, *ipso facto* they could not be subjected to the provisions of section 505 and be termed a conspiracy. Petitioner, assuming for the moment the truth of the charge made against him, was guilty of receiving a bribe as a public officer, punishable by sections 2.61 and 28.312, Mich. Stat. Ann., and was guilty of aiding and assisting Howell in corrupting legislative action punishable by section 28.979 Mich. Stat. Ann., which makes all accessories liable as principals. Every act, therefore, of petitioner was expressly subjected to penalty

by other statutes of the State of Michigan, and therefore, could not be termed a conspiracy under section 505.

In re Resler, 115 Nebr. 335;
Davis v. People, 22 Colo. 1;
State v. Bell, 205 N. C. 225.

There was, therefore, at the time of the commission by petitioner of the acts charged against him no such crime under the laws of the State of Michigan as that alleged against him. Inasmuch then as there was no law defining the defense, his conviction was a denial of due process of law.

Stewart v. Michigan, 232 U. S. 665.

CONCLUSION

The state supreme court in affirming as it did petitioner's conviction has denied him the due process of law guaranteed by the 14th amendment to the United States Constitution.

We submit that the Writ should issue as prayed.

Respectfully submitted,

GEORGE STONE,
Attorney for Petitioner,
2163 Penobscot Building,
Detroit 26, Michigan.

LLOYD A. LOOMIS,
WILLIAM L. COLDEN,
508 Tobin Building,
Detroit 26, Michigan,
Of Counsel.

APPENDIX "A"

"Mr. Sigler (special prosecutor): I take it you don't want them (the jury) to know what the facts are.

Mr. Black: I take exception to that remark of Mr. Sigler" (18).

"Mr. Sigler: Then why don't you sit down and let me go and we will be through" (24).

"Mr. Sigler: We are trying to get it and if you will leave us alone until we have covered it—

Mr. Black: Just a moment—

Mr. Sigler: If counsel is going to object every time we try to say something—I am trying to cover this honestly and fairly as I know how.

Mr. Black: I am not questioning counsel, I am asking for a ruling on the answer" (40).

"Mr. Golden: I am going to object to that.

Mr. Sigler: These lawyers don't like it that way, you see" (40).

"Mr. Sigler: I notice you are doing a lot of objecting to everything this morning" (45).

"Mr. Sigler: Perhaps some of us are not as smart as Mr. Black, and don't know how to prove these things.

Mr. Black: I take exception to that remark * * *" (48).

"Mr. Sigler: Won't you come down some time and tell us how to try lawsuits!" (51.)

"Mr. Sigler: These dramatics that my brother is putting in on this occasion * * *" (56).

"Mr. Sigler: Sure, you have been objecting to everything around here" (56).

'Mr. Sigler: Just a moment, my cantankerous brother • • •'' (58).

"Mr. Sigler: It is all objected to. What difference does it make? Suppose they serve soda pop and play cards?

The Court: Let's get along.

Mr. Sigler: They may have had doughnuts on one occasion" (69).

"Mr. Sigler: If you will try your lawsuit, there won't be any argument" (70).

"Mr. Sigler: Well, then in the future I am going to ask that you frame your questions accurately and not misleading.

Q. Now, Mr. Sigler, I will take my instructions—

Mr. Sigler: Address your remarks to the Court. I don't want you to talk to me. I don't want to listen to you.

Q. Now, your Honor, I don't know why I should be subjected to that kind of treatment here by Mr. Sigler.

Mr. Sigler: Because you are not fair with the witnesses, the reason, if you want to know, and because you don't state accurately • • •'' (80-81).

"Mr. Sigler: Why because the question is silly. That is the reason. It is so axiomatic, so self-evident" (82).

"Mr. Sigler: Counsel asks for all conversation he wants to know, and he doesn't want something about slot machines, brother" (70).

"And did you come by train to Greenbush Inn, or by auto?

A. By auto.

Mr. Sigler: Now what difference does that make? Suppose he went by bus, or rode a bicycle? What difference does it make? It seems that we are taking a lot of unnecessary time" (129).

"Mr. Sigler: I don't care what you ask me. You are taking a lot of unnecessary time here.

"The Court: Let's get along" (154).

"Mr. Sigler: Well, have you got through with your speech now, Mr. Black?" (172.)

"Mr. Sigler: Why, my brother, you should learn some day that you have a right to test the credibility of a witness. If you will look at your books, you will find that" (173).

"Mr. Sigler: We won't put it in that plain language. I will withdraw it so my brother won't be annoyed" (176).

"Mr. Sigler: Are you getting jittery this morning?" (177.)

APPENDIX "B"

People v. Diggs (petitioner's case)	*People v. DeLano**
1. Why, because the question is silly. That is the reason (82).	1. The question is so silly, your Honor (857).
2. Just a second. I submit this obstreperous manner of counsel is objectionable (65). Well, just a moment, my cantankerous brother * * * (58).	2. Just a second, if the Court please, my obstreperous brother here * * * (539).
3. Well, have you got through with your speech now, Mr. Black? (172.)	3. What are you doing, making a speech on the subject or asking a question? (454.)

*Figures in parentheses here refer to pages of printed record filed in the DeLano case with the state supreme court.

4. I take it you don't want them (the jury) to know what the facts are (18).

4. I don't suppose you do want any of the background in, but the People do (282). Do you want them to see some of the graft checks too? (603.)

5. Won't you c o m e down some time and tell us how to try lawsuits (51). Perhaps some of us are not as smart as Mr. Black, and don't know how to prove these things (48).

5. Well, you are not the only lawyer here, though. You may be surprised to know that (467).

6. What difference does it make? Suppose they serve soda pop and play cards? • • • They may have had doughnuts on one occasion (69).

6. Wait a minute, what difference does it make how he got his ice, whether they had n a p k i n s and served doughnuts (605).

7. Are you getting jittery this morning? • • • Is your conscience bothering you? (177.)

7. Well, you don't need to become excited or disturbed (463).

8. Then why don't you sit down and let me go and we will be through (24).

8. Then why don't you sit down and be patient, and be a nice boy, and we will tell you all about it (710).

9. I notice you are doing a lot of objecting to everything here this morning (45).

9. Wait until I am through and then object to your heart's content (486).

10. I don't care what you ask me. You are taking a lot of unnecessary time here. Counsel asks for all the conversation he wants to know, and he doesn't want something about slot machines, *brother* (70).

10. Well regardless of what you would like to do you are going to be interrupted every time I think your question is improper, *brother* (434).

11. Now, what difference does that make? Suppose he went by bus, or rode a bicycle? (129.)

11. That is objected to until he specifies qualifications for what—to drive an automobile, or help his wife wash d i s h e s, or what? (428.)

FREE COPY

Office - Supreme Court, U.
FILED
NOV 15 1948
CHARLES ELMORE CROPLE
CLERK

In the

Supreme Court of the United States

October Term, 1948

No. 295

CHARLES C. DIGGS, Petitioner

v.

THE PEOPLE OF THE STATE OF MICHIGAN

On application for certiorari to the Supreme Court of the State of Michigan

Brief opposing Petition for Certiorari

Eugene F. Black
Attorney General of the State of Michigan

Edmund E. Shepherd
Solicitor General of the State of Michigan

Daniel J. O'Hara
Assistant Attorney General

Counsel for Respondent
Lansing 2, Michigan

H. H. Warner
Of Counsel

FRANKLIN DE KLEINE COMPANY, STATE PRINTERS, LANSING, MICHIGAN

Subject Index of Matter in Brief

		Page
I	Opinions of courts below	1
II	Counter-Statement on Jurisdiction	2
III	Counter-Statement of the Case	3
IV	Summary of the Argument	5
V	The Argument	6
VI	Conclusion	15

Appendix A. Copy of 'Counter-Statement of Facts' in brief filed on behalf of the State in the case of People v. Logie & Diggs in court below 19

Appendix B, copy of argument on Question One, in State's brief filed in court below..... 43

Table of Cases in this Brief.

Adamson v. California, 332 U.S. 46 11

Erie R. Co. v. Tompkins, 304 U.S. 64 ..... 5, 13

Herndon v. Georgia, 295 U.S. 441 ..... 3, 9

People v. Bigge, 297 Mich. 58 10

Page

People v. Burnstein, 261 Mich. 534 11

People v. DeLano, 318 Mich. 557 ..... 4, 14

People v. Logie and Diggs, 321 Mich. 303 1

People v. O'Hara, 278 Mich. 281 9

People v. Ormsby, 310 Mich. 291 14

People v. Reading, 307 Mich. 616 ..... 3, 13

People v. Sims, 34 N.W. 2d 1 14

People v. Thompson, 221 Mich. 621 13

Skuy v. United States, 261 Fed. 316 14

Cases cited in Appendix B

People v. Burnstein, 261 Mich. 534 ..... 46, 48, 60

People v. DeLano, 318 Mich. 557 ..... 43, 46

People v. Frontera, 186 Mich. 343 50

People v. Kimbrough, 193 Mich. 330 54

People v. Neal, 290 Mich. 123 54

People v. Nemer, 218 Mich. 163 50

People v. Nemeth, 258 Mich. 682 46

Page

People v. Reading, 317 Mich. 616 49

People v. Shelters, 99 Mich. 333 59

People v. Tomczak, 250 Mich. 679 ..... 59, 60

People v. Swartz, 118 Mich. 292 46

People v. Watson, 307 Mich. 596 49

People v. Williams, 218 Mich. 436 46

Court Rules:

United States Supreme Court Rule 38 (2) 2

United States Supreme Court Rule 27 (4) 3

Mich. Court Rule 71 (4) 8

Mich. Court Rule 67 (1) 13

Mich. Statute:

Code of Criminal Procedure, chap. 9, § 26, 3 Comp. Laws 1929, § 17354, Stat. Ann. § 28.1096 ..... 7, 9, 10

Text Books, etc.

10 Cyc. of Fed. Procedure, § 4990, p. 428 5

54 Am. Jur., United States Courts, § § 348 and 350..... 5

I Gillespie, Mich. Criminal Law & Procedure, § 498, pp. 608-609, footnotes 16 and 17 50

In the

Supreme Court of the United States

October Term, 1948

No. 295

CHARLES C. DIGGS, Petitioner

v.

THE PEOPLE OF THE STATE OF MICHIGAN

On application for certiorari to the Supreme Court of the State of Michigan.

Brief opposing Petition for Certiorari

I

Opinions of Courts Below.[*]

The opinion of the court below is officially reported as *People v. Logie; same v. Diggs,* 321 Mich. (adv. sheets, Aug. 5, 1948) 303, and counsel are correct in stating, brief, p. 7, that the opinion of the trial court in denying motion for new trial (251-261) is unreported but appears in the printed record (265-266).

---

[*] Numbers in parentheses, unless otherwise plainly indicated, refer to pages of the printed record.

II

Counter-Statement on Jurisdiction.

Counsel are correct, brief, p. 7, in citing the sections of Title 28, U.S.C., Revised 1948, on which they rely to establish jurisdiction, and they state, petition, p. 5, their reasons for allowance of the writ of certiorari.[1]

Our position on jurisdiction may be quickly stated:

1. **Question A**,[2] as well as the first specification of error[3] and the first point urged in argument,[4] was not raised in its federal aspect until on motion for rehearing (310) the appellant Diggs claimed he had been denied due

---

[1]

We assume for the purpose of this brief, that counsel thus disclose the basis upon which it is contended this Court has jurisdiction to review the judgment in question. Supreme Court Rule No. 38 (2).

[2]

On p. 4 of the petition, this question is stated: "A. Did the misconduct of the special prosecutor result in denial to petitioner of the fair hearing and due process of law commanded by the 14th Amendment to the United States Constitution?"

[3]

On p. 8 of his brief, counsel specifies: "A. The state supreme court erred in holding that the special prosecutor's misconduct throughout the trial did not deprive petitioner of a fair trial and due process of law guaranteed him by section 1 of the 14th Amendment to the United States Constitution".

[4]

The point so urged, brief, pp. 9-17, is that "Petitioner was convicted without a fair trial and due process of law".

process of law.[5] Nor did the court below decide such a federal question, 321 Mich. 303.

2. **Question B,**[6] although stated (285-286) as the first reason and ground of appeal by appellant Diggs, was never raised in the court of first instance, nor was it presented to the court of last resort in the brief filed by Diggs;[7] it was not mentioned in his motion for rehearing (310) nor in his supplemental motion therefor (313), and it was not considered or decided by the court below, 321 Mich. 303.

3. The two federal questions raised, possess no substance.

III

Counter-Statement of the Case.

We deem it necessary to correct the following inaccuracies and omissions in the petitioner's statement of the matter involved: [8]

1. It is said, p. 2, that 'the proofs against petitioner were extremely weak, depending solely upon the testimony of the self-confessed cheat and co-conspirator Howell'.

---

[5]

The question came too late in the court below to permit it to be raised here: Herndon v. Georgia, 295 U.S. 441, 445.

[6]

The second question is stated, petition, p. 4, as follows: "B. Was the criminal conduct charged in the information a crime under the laws of the State of Michigan?"

[7]

It was therefore abandoned: People v. Reading, 307 Mich. 616.

[8]

Supreme Court Rule 27, par. 4.

Our principal objection to the foregoing statement, and to others of similar nature, is that it is argumentative, and that it presents the conclusions of the writer of the brief.

We, therefore, in aid of the Court, publish as Appendix A, our Counter-Statement of Facts, including (1) the Substance of the People's Proofs, and (2) the Substance of the Defendants' Proofs.[9]

2. It is stated, petition, p. 3, as a matter of fact, that throughout the entire trial, the special prosecutor

> "persisted in a continuous, studied and calculated course of disparaging and belittling remarks directed against petitioner and his counsel as well as in a series of innuedos implying that they were withholding the truth from the jury. All of this was done for the sole purpose of prejudicing the jury against the accused and preventing a fair trial".

Again, this is merely the conclusion or opinion of counsel. We cannot accept it as true.

3. Nor can we accept as a legitimate part of the 'statement of the case', an assertion, p. 3, that 'this same special prosecutor had been extremely successful with such tactics in several other trials . . . arising out of the same grand jury investigation, and from which he received great publicity'.[10] It sheds more heat than light upon the problem.

---

[9]

This republishes the counter-statement of facts (or abstract of the testimony) set forth in our brief filed in the court below. When reading it, one may bear in mind the fact that the defendant Diggs was tried jointly with the defendant Logie.

[10]

Citing People v. Delano, 318 Mich. 557. We note, as do counsel for petitioner, that certiorari was denied by this Court, 334 U.S. 818.

4. And, of course, it goes without saying that counsel merely draw their own conclusions when they add, p. 4, that 'the inevitable result of such misconduct by the prosecutor, sanctioned as it was by the trial court, was the denial of a fair hearing and a finding of a verdict of guilty by the jury (230)'.

IV

Summary of the Argument

1. **Question A**: Petitioner did not, in the course of trial (14-183, or in his motion for new trial (252-261), or in his statement of reasons and grounds for appeal (285-296), or in his brief filed in the Michigan Supreme Court, specifically set up or claim that remarks of the prosecuting officer had denied him due process of law, guaranteed by the Fourteenth Amendment, and there is no substance to his present claim.

If he made such a claim in his motion for rehearing (310) or in his supplemental motion praying such relief, in the court below, he cannot raise the question in this Court.

2. **Question B**, whether the information charged an offense 'under the laws of the State of Michigan', was non-federal, and exclusively a matter of state concern.[11] Had it been decided by the court below, the highest court of the State, this Court would consider itself bound thereby. As disclosed in our counter-statement on jurisdiction, the question was not raised below.

---

[11]

Erie R. Co. v. Tompkins, 304 U.S. 64, 78. For a clear statement of the rule that the construction, application and effect of state statutes and of the common law, in state courts, is for the state courts, see, also, 10 Cyc. of Federal procedure, § 4990, p. 428; and 54 Am. Jur., United States Courts, § § 348 and 350.

V

The Argument

Point One

Petitioner did not specifically set up or claim that remarks of the special prosecutor denied him due process of law, as guaranteed by the 14th Amendment, until he filed his motions for rehearing, and he cannot raise the question here.

1. The Court will, we feel sure, search in vain through the transcript of the trial (252-261) for any objection to remarks of the prosecutor, on constitutional grounds, or on the ground that by virtue of such remarks a mistrial should be declared. Certainly, there is no mention of the Fourteenth Amendment.

2. In the motion for new trial (252-261) filed by the defendant Diggs, reference is made to approximately 16 remarks of the prosecutor, said (252) to be 'uncalled for and improper' and 'prejudical to the defendant in this case'. Then, in his 7th ground for new trial (260-261), counsel for Diggs states that such errors 'were cumulative in effect and deprived the defendants herein of a fair and impartial trial, as guaranteed by the Constitution *of this State*'. This, we respectfully submit, did not raise a *federal* question, nor did the defendant claim he had been denied due process of law.

3. Remarks of the prosecutor were cited as error in the statement of reasons and grounds for appeal in the court below (285-286). The third of such reasons and grounds

(286) recites, *inter alia*, that the defendant Diggs, as the result of such remarks made to counsel for Logie,

> "was greatly prejudiced before the jury in said cause, and as a result of which the jury was greatly biased against the respondent in its consideration of the case, *all of which resulted in miscarriage of justice . .*".[12]

We respectfully submit that such an assignment of error does not raise the claim that due process of law, guaranteed by the Federal Constitution, 14th Amendment, has been denied.

4. Counsel will, we assume, concede that in the brief filed on behalf of the appellant Diggs in the court below, no claim was made that because of such remarks, the defendant was deprived of due process of law guaranteed by the Federal Constitution. The question raised was whether the conduct of the special prosecuting attorney had been 'so prejudicial as to deny the respondent Charles Diggs a fair and impartial trial'. Counsel (not at bar in the present cause) urged it was evident that 'part of the prosecution's strategy was to create an attitude of suspicion and prejudice in the minds of the jury against the respondents Diggs and Logie before they took the stand', and that 'the atmosphere thus created . . prevented the fair and impartial trial to which they were entitled', but he did not contend that because of such conduct the respondents were deprived of their liberty without due process of law; he did not cite

---

[12]

The term 'miscarriage of justice', as used in this assignment of error, probably indicated the writer's intent to bring himself within that provision of the Michigan code of criminal procedure, ch. 9, § 26, 3 Comp. Laws, 1929, § 17354, Mich. Stat. Ann. § 28.1096, which forbids reversal of judgment or verdict unless the error assigned 'has resulted in a miscarriage of justice'.

the Fourteenth Amendment to the Federal Constitution; and he did not cite one decision of this Court in support of any contention throughout the brief.[13]

5. After the court below had affirmed petitioner's conviction, 321 Mich. 303, and on the last day of the period prescribed by Michigan court rule No. 71 (4), petitioner's present counsel filed his motion for rehearing (310-311), in typewritten form (300); and on the 11th day of June 1948, they filed a printed 'Supplemental Motion . . for Rehearing' (311A). On the 22nd day of June 1948, the motion for rehearing was duly submitted (333) and denied (334).[14]

Among the reasons urged for rehearing were (310):

> "5. The court erred in holding that defendant was not deprived, by the conduct of the special prosecutor and the trial court, of due process of law contrary to Art. II, Sec. 16, Constitution of 1908 of the State of Michigan, and Amendments V and XIV of the Constitution of the United States".

And it was claimed that the decision of the court below affirming the conviction by the trial court is 'in the circumstances, a denial by the State of Michigan of the due

---

[13]

We will, if it be deemed necessary, request the Court to permit us to file as many copies as may be available of the brief filed on behalf of petitioner as appellant in the court below.

[14]

Michigan Court Rule 71 (4) provides in part that: 'No application for rehearing will be considered by the court unless the moving party shall, within 20 days from the filing of the opinion therein, cause (the motion) . . . to be printed, . . . and 24 copies . . . filed', but we did not object to the typewritten copy, and the court below considered it.

process of law guaranteed to this defendant by Amendments V and XIV of the Constitution of the United States'.

In the first place, such a claim of violation of rights guaranteed by the Federal Constitution cannot be made the basis of a review by this Court.[15]

And, secondly, the court below did not hold that the defendant 'was not deprived, by the conduct of the special prosecutor and the trial court, of due process of law contrary to . .' the Fourteenth Amendment. The court, 321 Mich. 303, did not decide such a question. Mr. Justice Bushnell did say, p. 307, id., that one of the controlling questions was: '(3) Did the treatment thus accorded defendants by the special prosecutor and the court deprive them of their *constitutional* right to a fair and impartial trial?', but he did not consider any express 'constitutional right' guaranteed by the Federal fundamental law.

The opinion of the court below closes thus:

> "No prejudicial errors are found in the trial amounting to a miscarriage of justice.
>
> 'The test it not whether there were some irregularities but instead did the defendants have a fair and impartial trial. 3 Comp. Laws 1929, § 17354 (Stat. Ann. § 28.1096)'. *People v. O'Hara*, 278 Mich. 281, 306.
>
> The judgments are affirmed".

---

[15]

"The long-established general rule is that the attempt to raise a federal question after judgment, upon a petition for rehearing, comes too late, unless the court actually entertains the question and decides it".

Herndon v. Georgia, 295 U.S. 441, 443.

Under the express provisions of Michigan's Code of Criminal Procedure, chap. 9, § 26, cited above as 3 Comp. Laws 1929, § 17354, Stat. Ann. Mich. § 28.1096,[16] as construed by the Michigan Supreme Court, the test applied to the record of any criminal prosecution, upon review, is whether the defendant has had a fair and impartial trial, or whether there has been a 'miscarriage of justice'. But the test is *not* applied in determining whether a defendant in a criminal cause has been deprived of due process of law under the Fourteenth Amendment. As the Michigan Supreme Court has said, in *People v. Bigge,* 297 Mich. 58, at 72:

> "The statutory provision may mollify minor errors which clearly can be held not to affect the result, but it is not a cure-all and it must serve within constitutional limitations. It cannot cure an error which deprives an accused of the right of due process of law".

We, therefore, respectfully submit that though the court below applied the statutory test, and found no prejudicial error 'amounting to a miscarriage of justice', this does not mean that he considered a federal question involving claimed violation of the due process of law clause of the Fourteenth Amendment.

---

[16]

"Sec. 26. No judgment or verdict shall be set aside or reversed or a new trial be granted by any court of this state in any criminal case, on the ground of misdirection of the jury, or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, unless in the opinion of the court, after an examination of the entire cause, it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice".

6. Moreover, the court below held that the numerous alleged prejudicial and derogatory remarks of the special prosecutor had not influenced the jury adversely to the rights of the defendants, 321 Mich. 307-309. Mr. Justice Bushnell applied the principles of the case of *Burnstein*, 261 Mich. 534, 538, to the effect that 'it is not to be presumed that jurors, in direct violation of their well-known duty, indulge in unjustifiable inferences' from remarks made in the heat of trial and under provocation.

This Court has said:

> "We shall not interfere with such a conclusion".
>
> *Adamson v. California*, 332 U.S. 46, 58.

Furthermore, there is no merit to the petitioner's claim that he was deprived of due process of law.

Counsel contend that Diggs was deprived of due process of law because the prosecutor made remarks which disparaged counsel for the defendant Logie. As the court below so aptly said:

> "Nor do we find in the instant record that defendants' own counsel were entirely blameless. In making this observation we do not suggest that trial judges be relieved of their responsibility. However, we find no room for criticism of the trial judge's conduct in the instant case. His task was difficult and the problem serious, and yet every consideration was given to the rights of the defendants. On review, we find no abuse of judicial discretion".

And it was pointed out, 321 Mich. 309, that 'reviewing courts are unable to have before them the tone of voice or

the manner in which question are put. That is why rulings in such matters must rest largely in the sound discretion of the trial judge. The suggested innuendo of the language of a given question may have thus been entirely absent'. We respectfully submit the same observation might be made of alleged prejudicial remarks.

It would be an impossible task, within the limits of a brief which should be concise, to discuss each of the numerous remarks scheduled in petitioner's Appendix A and Appendix B, but to aid the Court, and as documentation only, we republish as Appendix B, *post,* a copy of this part of the argument in the State's brief filed in the court below.

Point Two

The question whether the information charged an offense known to the laws of Michigan, is strictly non-federal, and it was not raised or decided in the court below.

Counsel for petitioner earnestly contend, brief, pp. 18-20, that 'the giving of a bribe and the taking of a bribe do not constitute a conspiracy *under the laws of the State of Michigan'*, and they invoke the so-called 'Wharton Rule' of conspiracy law adopted by certain courts of the United States. That rule seems to be that 'there can be no conspiracy to commit a crime where a concert of action and plurality of agents are necessary elements of the substantive offense for the commission of which a conspiracy is alleged to have been formed', and on page 19 of their brief, counsel cite four federal decisions to sustain their position.

1. One trouble with this argument is that the question does not involve any claim under the Federal Constitution; it concerns (as counsel have stated it) only the interpretation and effect of *'the laws of the State of Michigan'*, which,

of course, is a matter of concern for the Supreme Court of that State, with which this Court will not interfere on review.[17]

2. But there is nothing for this Court to review, because the question was not presented to and decided (or even considered by) the State Supreme Court.

(a) We find in the record of the trial court no motion to quash the information on the ground that it charged no offense known to the law, nor does petitioner claim that the point was raised during the trial, and it was not presented to the trial judge on motion for new trial (252-261).

(b) The first reason for appeal assigned by appellant Diggs (286) stated that the information was void 'in that it charges no crime known to the statutes of the State of Michigan or the common law', but the point was not raised in appellant's brief filed in the Michigan Supreme Court. And the question was not raised in petitioner's motions (310, 311A-332) for rehearing or the brief filed in their support; indeed, the entire brief is devoted to a discussion of what constitutes a fair trial under the 'law of the land' and the due process clause.

(c) Counsel concede, brief, p. 18, that the point, while presented to the state supreme court for its consideration by petitioner's assignment of error number (1) (286), it 'was not passed upon by that court'.[18]

---

[17]

See authorities cited in footnote 11, esp., Erie R. Co. v. Tompkins, 304 U.S. 64, 78.

[18]

The rule in Michigan is that where a question is not briefed it will be considered abandoned, and likewise an assignment of error. People v. Thompson, 221 Mich. 621; People v. Reading, 307 Mich. 616. Mich. Court Rule 67, par. 1.

They endeavor, however, to bring this case under the rule that 'radical fault in the trial of a crime involving the liberty of defendant will be noticed and corrected by the reviewing court, although there be no proper objection, exception, or assignment', citing

Skuy v. United States (CCA 8th), 261 Fed. 316.

The decision in the case of *Skuy* was made by a reviewing court (in considering remarks of an assistant United States attorney, which flagrantly appealed to racial prejudices), and not by this Court in exercise of its limited jurisdiction to protect federal constitutional rights in state courts.

We, therefore, respectfully submit that the question of the nature of the charge set forth in the information, since it involves Michigan law, and since it was not raised below, should not be here considered in its federal aspect as a claimed violation of due process.

It might be added, however, that the Supreme Court of the State of Michigan has repeatedly held that the crime of conspiracy to obstruct justice, or corruptly to influence the course of legislative processes, is an offense known to the law of the State, and in some of the following cases the 'Wharton Rule' has been rejected or distinguished,

People v. Ormsby, 310 Mich. 291;

People v. Delano, 318 Mich. 557; certiorari denied, 334 U.S. 818;

People v. Sims (Oct. 4, 1948, not yet officially reported), 34 NW 2d 1.

VI

Conclusion.

We, therefore, respectfully submit that since no federal question of substance was raised or decided in the court below, the petition for certiorari should be denied.

Respectfully Submitted,

Eugene F. Black
Attorney General of the State of Michigan

Edmund E. Shepherd
Solicitor General of the State of Michigan

Daniel J. O'Hara
Assistant Attorney General

Counsel for Respondent
Lansing 2, Michigan

H. H. Warner
Of Counsel

APPENDIXES

Appendix 'A'

Copy of the 'Counter-Statement of Facts' in the State's brief in People v. Logie and Diggs.

II

Counter-Statement of Facts.

1

Substance of the People's Proof's.

Chester M. Howell (32) had lived in Saginaw since 1909, was 62 years of age, married, with a family, and was the publisher of a newspaper in Chesaning and the president of the Michigan Press Association in 1939.

On direct examination (32-54), this witness testified (33-34) that as long ago as 1907 he had known Senator Jerry T. Logie, who lived in Bay City and was connected with a drug company there; he met him through his connection with certain tourist associations in that part of the state, so he was well acquainted with Logie when the latter became a member of the senate in 1939; and they were together in the senate as members during the legislative session of 1941.

So far as he could remember (33-35), Howell's acquaintance with Senator Charles C. Diggs began when they attended the 1939 session.

During the 1941 session (35), Howell was the ranking member or vice-chairman of the senate committee on state

affairs, and he was also a member of one or two other minor committees.

The witness testified (35-37) that for 18 or 20 years prior to as well as during the 1939 and 1941 sessions, he knew one Constantine Daniels, nick-named 'Teen Daniels', who was 'just a good friend', having met him in Lansing where Daniels was around the legislative sessions. This 'Teen' Daniels, Howell testified (37), was recognized by members of the senate as being a lobbyist.

Howell recalled (37) House Bill 22, the so-called racing bill upon which this case is predicated, and he stated he was a member of the state affairs committee during the time the bill was considered by that body after it was transmitted by the house to the senate on the 16th day of May and referred to the committee in question.

During that period (37-38), and 3 or 4 days after the bill was received by the committee on Friday the 16th day of May, Teen Daniels talked with Howell at one side of the lobby of the Olds Hotel. Daniels said he had $3,000 and he wanted Howell to try and defeat House Bill 22, which was in the committee of state affairs at that time; he wanted Senator Logie of Bay City, who was a member of the committee, to have $1,000 of this $3,000; and he wanted Senator Diggs, who was likewise a member of the committee, to have $250.00 of this amount. Howell told him he would do what he could (38).

That (Howell said) was the entire conversation he had with Daniels at that time.

It was Howell's remembrance (39) that the next day (he wouldn't be sure whether the senate was in session or whether the conversation was before the senate session

started or afterwards, but it was during that time), he had a talk with the defendant Jerry T. Logie (38) on the floor of the senate (39).

Howell told Senator Logie that Teen Daniels had asked him to kill house bill 22, the racing bill which was in their committee of state affairs, and that he wanted Senator Logie to have $1,000; he, Senator Logie, said all right (39). That was about all the conversation (40).

Howell likewise had a conversation with the defendant Senator Diggs, on the floor of the senate, the same day, for he saw both of them just as soon as he could and told them what the situation was. He told Diggs the same story that he told Logie (40).

When the witness approached (41) Senator Diggs, after talking to Logie, he told him Mr. Daniels had asked him to do what he could to have house bill 22, the racing bill, killed, and that there was $250.00 in it for him, Diggs, and he said 'All right'. That was the substance of his conversation with Diggs.

Following the conversations aforesaid, Howell made a motion before the committee on state affairs, that House Bill 22 be taken up, and be not reported out, that action on it be indefinitely postponed (41), which, he said, (42), 'is a way by which a bill is pretty well killed unless you can override a great majority of the members of the committee' (42). The committee members were Messrs. Munshaw, Logie, Diggs, Dignan, Brooks, Thompson, Burhans and Milliken, and the witness Howell. He was not so sure about Senator Burhans, or Senator Milliken having been there (44).

After the vote was taken to kill this bill, the witness testified (45) he had further talk with this man Teen Daniels, who called him up from Grand Rapids, at the Olds Hotel, on Saturday morning, the 24th of May. Daniels asked him to come to his home in Grand Rapids and get $3,000 from him, which carried out the promise made Howell when he talked to him on the floor of the Olds Hotel lobby.

Howell testified (45-46) he then went to the home of Teen Daniels in Grand Rapids, got the $3,000 in paper money which Daniels handed to him in an envelope; and he took it (45), put it in his pocket, and went home to Saginaw for the weekend (46).

Howell returned to Lansing from his house in Saginaw the following Monday, May 26th, with the $3,000 that Daniels had given him, and when he arrived he saw the defendant Jerry Logie at the senate session in the afternoon (46), about 1:00 o'clock. Howell asked him to come to his room, 811 Olds Hotel after the session, and Logie did so (47).

The witness then gave Logie $500 and told him there would be some more later. Logie accepted the $500, put it in his pocket, and thanked Howell for it (47). Between the time of their first conversation about killing this bill, and the time Howell handed Logie the $500, Howell said he had not discussed the matter with him, casually or otherwise.

Howell also then talked with Senator Diggs, on the floor of the senate, asking Diggs to come to his room (47), and when he came the witness gave him $150 which Diggs took and put in his pocket, thanking Howell (48).

The (senate) session recessed on the following day, the 27th of May, to a date that the witness could not recall.[8]

Howell testified (48-50) he later met Senator Logie at the annual meeting of the executives' committees of the East Michigan Tourist Association (Hereinafter styled 'EMTA', held June 20, 21 and 22, 1941 (51), 1941, at Greenbush Inn, north of Oscoda and Au Sable, on U.S. 23.[9]

The meeting, at which Logie was present, was largely social; and on Sunday morning the supervisors of adjacent counties were guests of the EMTA at breakfast; this because the supervisors are large contributors to the financial upkeep of the tourist association (49).

The witness identified a picture of Logie in a group photograph (people's exhibit 15), playing cards there with certain others who were in attendance (50).

Howell testified (51-53) that while at this meeting of the EMTA, he had a conversation with Logie in the lobby of the Greenbush Inn where he met him during the afternoon of Friday. The witness asked Logie up to his room, that he had something to tell him; and they went to Howell's room where they were alone (52); and Howell there gave Logie $300; Logie thanking him, put the money in his pocket, and left without further conversation.

---

[8]

The Senate Journal, Vol. 2, p. 1769, records this adjournment as from May 27 to July 8, 1941.

[9]

Each summer the EMTA had their executive members, their wives, and the senator in the districts they served and their wives and a few newspaper men for a few days outing at some resort that hadn't been formally opened yet (49).

The understanding that Howell had with Teen Daniels was that he, Howell, was to give Logie $1,000; the witness admitted 'that was a cheat'; and it was the only reason why he did not give Logie the other $300 (53).

Howell testified (53-54) he had not been given immunity in this particular case. He said he was involved in another conspiracy, and after that he appeared before the grand jury. He was granted immunity by the grand jury after he had made certain admissions to the special prosecutor, wanting to clear up certain things and help as he could.

The witness stated (54) there was no way of answering positively the question what the vote was on the occasion when this bill was killed by the members of the senate committee of state affairs, but his memory was it was an all 'Yes' vote, that there were no negative votes.

On cross-examination (54-95), by Logie's counsel (54-86), Howell stated (56) he knew Logie through several organizations, but he could not recall whether "Jerry" had ever been in his house; and he was closely examined concerning a few visits he had made to Logie's home over his drug store; but he did not recall being upstairs in Logie's home more than once, when he talked with Mrs. Logie on a trivial subject (57).

Howell said (57-58) he had had no private business with Logie at any time, and aside from their joint membership in EMTA, he did not recall any social trips made with Logie, though there might have been some.

The witness was then closely questioned in relation to his friendship with Teen Daniels (59) and the date of his first conversation with that individual (60-61) which he

fixed as two or three days after May 16, 1941. And he repeated that he talked with Logie the next day.

On the occasion of his conversation with Logie, the witness said (63), the latter used no other words than 'All right'.

Howell was then examined (63-64) concerning the date of his trip to Grand Rapids to see Teen Daniels on Saturday the 24th day of May; and he stated the approximate time of his departure (10:00 to 10:30 a.m.) from Lansing and the time of his arrival (before noon) in Grand Rapids.

He again stated (64) that Senator Logie went to the witness' hotel room between 5:30 and 6:00 p.m. the late afternoon of Monday, May 26th, but he later broadened it a little bit and made it between 5:40 and 6:30 or 7:00 o'clock, 'after the session anyway' (65).

Howell agreed (65-66) he had testified at the preliminary examination that the first payment to Logie of $500 was made sometime between their talk and before the end of the session, and that he could not then fix the exact date.

The witness said (66-67) that Logie never asked him for the balance due him; and when the latter came to Howell's hotel room on Monday, May 26th, 1941, and Howell paid him $500, he did not ask for additional money then.

Again examining people's Exhibit 15 (the picture taken at the Greenbush Inn), the witness identified others than Logie (69-72).

Howell saw Mrs. Logie at the Greenbush Inn (at the EMTA meeting in late June 1941) but he did not know

what time Mr. or Mrs. Logie arrived, or where their room was located, and he never visited it (72).

When Howell met Logie in the lobby of the Greenbush Inn, he could not recall whether Logie accompanied him up to his room, but he did tell him his (Howell's) room number and told him he would be up there, and soon he arrived. On that occasion, Logie did not ask anything about more money than what Howell gave him at that time, though Howell was to give him $1,000; and the balance of the $3,000 that Howell claimed he got from Teen Daniels still remained in Howell's possession. He spent it (73).

Howell was then called upon to testify, and he did (74), that when he was indicted in the 'naturopathic case', he had a talk with the special prosecutor, and he decided that (was) the only frank, honest thing to do; and the prosecutor convinced him that he was in this thing to shield no one at all, but to go right to the bottom of everything—so Howell told him about this situation. That was in 1944.

The witness testified (74) no promises whatsoever were given him if he would disclose Senator Logie in this case. He, Howell, was not indicted in this case; nor had he received a sentence in any other; and he was indicted once (75).

At this point, counsel for Logie examined (75-83) this witness at length regarding his knowledge or lack of knowledge of the several provisions of House Bill 22, their merits and demerits, the details of which need not be set forth here.

Howell then testified (83-84) there always were a large number of bills pending in the senate state affairs committee which were not reported out to the floor in the 1941

session, since that committee is the graveyard of a great number of bills introduced, and this is so of every session.

Every committee, he said (84) makes its own rules early in the session, and this committee made a rule that 5 out of a total membership of 9 should constitute a quorum. Howell thought it would take six votes to kill a bill, and he did not recall that it required 7 votes as fixed by that committee (84-85). He did not know if it was 6 or 7 (85). But there was, he testified (86) no discussion of that bill in this committee of state affairs, but the motion to postpone was carried unanimously; that there was no negative votes.

Cross-examined by Diggs' counsel (86-95), this witness testified he first met Diggs in his official capacity as a member of the legislature in 1939, when he was a senator; in 1941 he was a senator from Detroit (87).

The witness again related the conversation he had with defendant Diggs, on the floor of the senate, about House Bill 22 (87-88). While Howell said he told Diggs about his previous conversation with Daniels and the $3,000 which Daniels had to defeat the bill, he immediately corrected that statement by saying that he didn't say anything about Mr. Daniels at all. He just told Diggs that if he would help defeat House Bill 22, 'there would be $250 in it for him'. He said 'all right'.

Again, Howell admitted he had cheated both Diggs and Logie by withholding from each a portion of the $3,000 he had received from Daniels and promised each defendant (89-91).

The witness never told Mr. Logie that he was asking Mr. Diggs to go along with him on that bill; and he never told

Mr. Diggs that he was asking Mr. Logie to do so; so he had never told either of them of any action that the other was contributing toward the killing of this bill (94).

On re-direct examination (95-99), Howell testified he pleaded guilty to the naturopath indictment, after which he appeared before the grand jury (95); and it was then he told about this matter and certain others, and at that time he was granted immunity (96).

He testified (96-97) that Logie also lived in the Olds Hotel, on the same floor, down the hall from Howell's room. Naturally he saw him many times, every day during the session.

Howell had other financial transactions with the defendant Logie on other bills; on two such occasions Logie paid him. He did not remember the specific dates, but it was during the 1939 session (96). The amount paid on each occasion was $100, in relation to medical legislation, to influence Howell's vote against certain types of legislation (97).

On re-cross examination by Logie's counsel (99-101), the witness testified (99) that Logie went to Howell's room in the Olds Hotel on Monday afternoon, May 26, 1941, after the senate session had adjourned. The records of the senate (he said) show for that day the afternoon session concluded at 5:40, so it would be some time between 5:40 and 9:00 o'clock. He thought he said 7:00 before, some time in there. He stated that at the preliminary examination, he had testified that the time was 'some time after the senate session, the senate session on Mondays are eight o'clock at night until—this would be some time after that'. He was mistaken. The senate had met at one o'clock that Monday because they were near the end of the session (100).

Explaining this, the witness said he corrected his knowledge of that by looking up the records, for he wanted to be absolutely sure as to the time they met on Monday, May 26th; he was a little confused at the examination as to just when, but he found out definitely, in his own mind (100). Nobody told him to go and look that up and get that correct before he came on the stand.

On cross-examination by Diggs' counsel (101-102), the witness testified that Diggs had never paid him any money at any time; and that he did not pay Diggs any money prior to the time he claimed he paid him $150.00 (102).

Hardin F. Davis, secretary-manager of EMTA since 1942, testified on direct examination (102-103) that he recognized the parties in a picture in a bulletin put out by the association (Ex. 15), taken on the occasion of a social gathering at the Greenbush Inn on Friday, Saturday, and Sunday, June 20, 21 and 22, 1941, as himself, Jerry Logie and others; that Logie came to the affair Friday morning, but the witness did not recall how long he stayed.

Cross-examined by Logie's counsel, the witness stated (103) Logie was also a member of the association as well as State senator. And he attended the meeting like other members and visiting legislators.

Cross-examined by Diggs' counsel, the witness testified (103-104) he did not see Diggs at the meeting in June 1941, nor had he ever seen him there on any occasion.

On re-direct (104), he testified that on the foregoing occasion, Senator Howell, as well as others, had a room.

On re-cross, in behalf of Logie, he saw Mrs. Logie there, and he knew the Logies stayed from Friday until Sunday (104).

2

Substance of Defendants' Proofs.

Each of three witnesses testified and was cross-examined (104, 105, 107), in relation to his knowledge of the reputation of the defendant Diggs for truth and veracity in the community of Detroit in which he lived.

Charles C. Diggs, one of the defendants, a funeral director, also engaged in the insurance business, living in Detroit since 1913, affiliated with a church organization since 1931, first elected to the legislature in 1936, and a member of the legislature (the senate) for 1941 (108), testified (108-115) in his own behalf.

On direct examination (108-110), Diggs testified (108) that in 1941 he made the acquaintance of Senators Howell and Logie and every member of the senate.

He denied (108) that in 1941 he had a conversation with Senator Howell in reference to House Bill 22, commonly known as the racing bill; or that he ever had occasion to go to room 811, Olds Hotel, to see Howell. He did not room in the Hotel Olds in 1941, but stayed in a private residence on Allegan street (Lansing).

He testified (109) that Howell did not on any occasion give him any money in any form; that Howell did not have any conversation with him on the senate floor in reference to any purported action on his (Diggs') part in reference to House Bill 22; nor did he ever pay the witness any sum of money any place at any time for the purpose of influencing Diggs' conduct in reference to voting on any bill.

Diggs testified (109) he belonged to the state affairs committee of the senate during 1941 and that while the record (Senate Journal, p. 1240) states that House Bill 22 was referred to that committee, he did not particularly remember it. He did not recall how he voted when the bill came up in committee.

The witness said (109-110) he never had any conversation with Mr. Logie in reference to House Bill 22 after it was referred to the committee on which he was serving, nor did Mr. Logie have any conversation with him about that bill.

And Diggs further testified (110) he did not know Teen Daniels; he did not remember ever meeting any gentleman by that name.

On cross-examination (110-114), this witness testified (110) that he had been arrested and convicted for misdemeanor; that he did not recall he was arrested the 1st day of December 1943, and charged with obtaining money under false pretenses, though he would not say he had not. He said he pleaded guilty to the misdemeanor; it was not a violation of his business as an undertaker; an affidavit was signed (he answered when asked to name the charge to which he pleaded guilty), and he pleaded guilty (112) 'to signing an affidavit in connection with that case'. It was absolutely false (he said) that he pleaded guilty of a violation of the World War Veterans' Act, in not complying with the law in regard to burying people at a certain cemetery.

He admitted (112) he spent 90 days in the Detroit house of correction.

The witness did not recall having made an application for a liquor license on one occasion (112), on June 19, 1937, through some man in Detroit, though he could have; and he may have made such an application as president of a political club.

Diggs further testified (113) he did not recall House Bill 22 coming over from the house, or any action taken on the senate committee, though he would say he was there. But he did not remember (114) what took place, he did not remember that bill or how he voted on it, and he could not tell whether he voted for or against voting it out. He could not tell a solitary thing about it.

On re-direct examination (114-115), the witness explained that his lack of knowledge of House Bill 22, and his failure to recall or remember how he voted on it in 1941, was due to the large number of bills pending, and the volume of committee business transacted, prior to final adjournment of the senate.

Jerry T. Logie, the other defendant, also took the stand and testified (115-150) in his own behalf, and, after stating his antecedents (115-116) as a former resident of Saginaw, and as a retail druggist and pharmacist from 1908 to date, he testified (116) that he was first elected senator from the Bay county district in 1938.

On direct examination (115-132), this witness testified that prior to coming to Lansing as state senator (in 1939) he knew Chester Howell of Saginaw for a period of at least a year-and-a-half or two years. During that time he met Howell through the EMTA (116), but he would not say he was intimately acquainted with him. Howell had visited the witness' drugstore, though not over three or four times a year, when passing through the city, and just stopping

in to say a few words, but he had not visited Logie's home (117).

Logie stated (117) he did not at any time belong to any group with Senator Howell that discussed general legislative matters in the state; but that they belonged to the same political party.

He testified (118) that during the 1941 session of the senate he had as a permanent residence room 806 Olds Hotel, and his wife lived with him in Lansing at that time.

Senators Flynn and Munshaw had adjoining rooms. Howell checked in and out, having no permanent room.

The witness knew Teen Daniels by sight, having been pointed out to him at one of the Republican state conventions (119).

Logie recalled (119-120) House Bill 22 which, the record shows, came over to the senate on May 16, 1941. He was a member during that session, of the senate state affairs committee, which was composed of the following members: Senator Munshaw, chairman, Senators Howell, Towns, Burhans, Milliken, Diggs, Brooks, and the witness, 9 in all. No record was kept of its proceedings, but the usual set of rules was approved, including provisions that a majority should constitute a quorum; that it required 7 votes to table a bill; and those rules were adhered to during the 1941 session (120).

There were a large number of bills at that session which were submitted to the state affairs committee, and more bills remained in committee than were reported out (120); it has always been that way in the state affairs committee, the witness testified (121).

Only such hearings as were demanded by interested persons, were held on bills pending in this committee; and the witness did not recall that Higgins who with Walsh sponsored the bill in the house, ever came to him or the committee while they were in session and asked for action thereon (121).

After House Bill 22 was sent to the state affairs committee of the senate on the 16th day of May 1941, the witness testified (122), he never discussed it at any time or place with Mr. Howell, nor did the latter ever talk to him about that bill in any way or at any time or place.

The witness denied (122-123) that Howell at any time on the floor of the senate came to him and told him that he had had some conversation with Teen Daniels or someone in Grand Rapids, and that he had a sum of money to use in reference to that bill; and he categorically denied Howell's testimony relating to other talks about the bill, to visits to Howell's room, to further conversations about action to be taken on the bill, and to offers of money.

Logie testified (123-124) that after the bill was in the committee for consideration, a vote was taken, probably on Wednesday of the week following the 16th day of May, and the bill was indefinitely postponed. He voted for such action, but did not know how many others voted the same way.

The witness stated (124) he did not agree with the language of the bill and to that extent was interested because (125) he was opposed to the creation of commissions; and he opposed it for the further reason that it would increase the cost of operation. The bill also provided an annual appropriation out of the general fund. Under the law as it

stood, money received from races was ear-marked for the state treasury, but under the new law it was not (126).

He also testified (126) that after action was taken by that committee, Howell did not pay him any money in his room in the Olds Hotel, or at any time or place; that he never knew that Howell had any arrangement with Teen Daniels, regarding some action on that bill; and he denied that he ever paid Howell any money in reference to any bill in the legislature.

Logie testified (127) he was not interested in medical legislation prior to the 1941 session; and he denied that Howell or any other person ever received any money from him for the purpose of influencing their vote for or against any bill.

He admitted (127) he attended a meeting of the tourist association at the Greenbush Inn in 1941 together with the officers and directors and representatives and senators of adjacent districts, and the supervisors of the close-in counties. He denied (128) that any gambling was engaged in.

Logie stated (130) he arrived at the inn late Thursday night, and he stayed in the same room throughout his visit there. He saw Howell there on Friday, but he did not know where the latter's room was located, and he denied (131) he was ever in Howell's room, or that Howell was ever in his room, or that they talked together about House Bill 22, or that he had any private conversation of any kind with Howell while he was at that meeting in the inn.

On cross-examination by counsel for defendant Diggs, the witness testified (133) he had known Diggs since January 1, 1939; that he had no occasion to have a conversa-

tion with Diggs in 1941 in reference to House Bill 22; that Howell never told him he had any understanding with Diggs in reference to any purported action on that bill or that he, Howell, had offered any money in any form, to Diggs for his influence or support.

On cross-examination by the prosecution (133-148), Logie testified (133-134) that he roomed at 806 Olds Hotel, and that Howell had room 811, four doors away; and that Senator Flynn (now of the liquor control commission) had room 807, between them. Flynn was one of his close friends.

He said (135) he did not spend much time in Flynn's room; they may have visited each other's room two or three times a week.

Senator Munshaw, chairman of the state affairs committee, had a room the second door down, but the latter very seldom visited anybody's room. He would not say they all got together up there like one happy family (135).

The witness admitted (135) that he and Howell were good friends, but not close.

Logie testified (136) he was chairman of the public health committee to which practically all medical and osteopathic bills were referred, but he was not because of his druggist connections, sponsoring certain interests in the medical profession. And he denied that he took money from anyone.

The witness was then questioned (136-137) in relation to his conviction on a similar charge in a case pending on

appeal in this court,[10] and over objection[11] he admitted he had been so convicted in circuit court.

The witness denied (138) he took money from both sides on the bank bill in 1941, or on certain medical bills. And he was closely questioned, over objection (138-139), concerning the liquor committee, of which he was a member in 1941.

He testified (140) in relation to his friendship for Senators Howell, Flynn and Dignan.

The witness was further cross-examined (140-148) on the subject of his knowledge of and objections to House Bill 22; and he testified (148-149) that over one-third of the bills which were referred to the state affairs committee of the senate in 1941, were never discussed, that nobody was interested, 'so they were killed'.

Fred I. Chase, secretary of the senate, recalled as a witness by the defendant Logie, testified (150-152) that in the 1941 session, out of 57 senate bills referred to the state affairs committee, 30 were reported out, leaving 27 in the committee at the end of the session. Of 36 house bills so referred, 11 were left in committee. In all, 38 bills were left in committee.

---

[10]

People v. Jerry T. Logie, Cal. No. 42,919, pending in this Court on a consolidated record settled in People v. Hancock, et al., Cal. Nos. 42,918, 42,920 and 42,921, in which no briefs have been filed in behalf of the appellants.

[11]

The admissibility of this testimony is involved in Question IV, Logie brief in this cause, p. 37.

Mrs. Bessie M. Logie, wife of the defendant Logie, testified (153-156) she always accompanied her husband to Lansing when he was in the senate and she did so in 1941 when they roomed at the Hotel Olds.

She knew who Chester Howell was, but he was never in the Logie home in Bay City and she was never in his (154).

The witness attended a meeting of the tourist association at the Greenbush Inn during the month of June 1941, arriving late in the afternoon and meeting Mr. Logie there. Chester Howell was never in the Logie room, and she never saw her husband go to Howell's room. She was with her husband from the time-she arrived there at the inn, for the balance of the day on Friday. On Saturday, Logie, the witness, and Mr. Moulthrop, went down to Tawas, coming back in the afternoon just in time to get ready for the banquet (155-156). And they were at the inn until 11 o'clock Sunday, when they went home. She did not see her husband and Howell talking together at any time during her stay at the inn (156).

Herman H. Dignan, secretary of state of Michigan, a member of the state affairs committee when a senator in 1941, testified (157-169) in behalf of the defendant Logie.

On direct examination (157-159), he testified that there were 9 persons on the state affairs committee that year; that he attended its sessions, but he did not believe any record was kept.

The witness testified (157-158) he knew there was such a bill as House Bill 22, and he knew it was in the state affairs committee; but he did not know it was before the committee, and he did not have any recollection of debates

or hearings thereon. He knew that Logie, Howell and Diggs were members of that committee.

And he stated that what he knew of Logie's reputation for truth and veracity, for honesty and integrity, in the community of Bay City where he resides, was good (158-159), such testimony being based on acquaintance with 'some people in Bay City, the hardware people, for twenty years'.

On cross-examination (159-162), the witness testified that Logie and he became acquainted when they went to the senate, and he would like to help Jerry if he could (159).

He named about 9 people he knew in Bay City, and he limited his testimony as a character witness to his talk with them, before and after Logie was indicted (160-161).

The witness did not attend all the meetings of the state affairs committee and, while the bill was not considered to his knowledge (161), he would not say it was not; it might have been considered and he had forgotten it, or he was not present. He couldn't remember anything about the bill, so far as the committee hearings were concerned (162).

On re-cross examination (163-169), Mr. Dignan was questioned concerning his knowledge of the pari-mutuel system of betting on horse races.

He also testified (167-169) that when a bill comes over to the senate from the house, there is commonly considerable statement and discussion about certain activity in the house, but he would not say that this was a hot bill. And, over objection (168), the witness testified he heard the talk that Claude Fitzsimmons had offered Gail Handy a bribe

over in the house not to get this bill out of committee over there. But he did not know that there was a determined and definite effort to kill this bill somewhere. The bill did pass in the session of 1943. But the witness didn't make any inquiry about the bill, and he could not 'even recall anything about it now'.

Four witnesses testified (169, 171, 175, 178) to Logie's reputation in the community in which he resided, for truth and veracity, honesty and integrity.

Earl L. Burhans, a lawyer, living at Paw Paw, a state senator in 1941, and a member of the state affairs committee that year, testified in behalf of the defendant Logie (179).

On direct examination, he testified (179-180) this was a 9-man committee when he served, previously it had been seven. The discussions on bills and action on bills does not become a part of the records of the senate except when the bill is reported out. If a bill were sent to that committee and not reported out, the witness wouldn't think there would be further mention of it in the proceedings.

His recollection and remembrance of House Bill 22, sent to the state affairs committee, probably gathered from reading the status sheet or the journal of the senate, was vague, for he attended sessions of that committee very irregularly; and he had no memorandum whatever or data in reference to bills that were sent to the state affairs committee; nor was he ever present in that committee when this bill was up, in any way, shape or manner. He never heard it discussed, attended no hearing on it, and knew nothing about it (180).

On cross-examination (180-181), he related a custom of the senate 'where a man would go from one committee to another just merely to make a quorum and then step out'; this could have happened for the chairman of this committee, 'to have called a meeting and Senator Logie to have been present and Senator Diggs to have been present, and Chester Howell to have been present, and certain other members of the committee just stepped in long enough to make a quorum and then have gone out' (181).

On re-cross examination (181-183), Mr. Burhans stated it never impressed him that this was a 'hot bill', and he had not heard that the bill came over to the senate with much talk and discussion that a certain lobbyist, Fitzsimmons, had offered Gail Handy a bribe. He did not hear that, though a piece might have come out in the newspaper, and it might have been given publicity, but he didn't see it.

He could not remember (182) that there was anything about this bill to excite him, but he 'surely would not have tolerated any such conduct'. And he didn't hear that the attorney general of the state of Michigan 'had conducted an examination of that matter, and whitewashed it' (182-183).[12]

Thereupon, both sides rested (183).

---

[12]

Mr. Burhans' testimony received on re-cross examination (181-183) was objected to 'as being incompetent and prejudicial in this matter' (181) and 'as incompetent and immaterial' and 'prejudicial to the defendant Logie'. See Question IV, Logie brief, at p. 39.

Appendix 'B'

Copy of 'Argument' on Question One, State's brief, People v. Logie and Diggs.

The Argument

Question One

(a)

Did the remarks of the prosecuting attorney call for a declaration of mistrial, and was this question timely and properly raised?[31]

The argument of counsel for each of these appellants follows the pattern furnished by the respondent's attorneys in *People v. DeLano*, 318 Mich. 557, 568-569, where it was urged that the remarks and conduct of the special prosecuting attorney throughout the course of the trial were prejudicial and that the convictions should be set aside.

Here, as noted in *DeLano*, 'in many instances these statements were made without being followed by objections by defense counsel, while in other instances when rulings were requested, such rulings were given and the jury instructed upon the same', 318 Mich. at 568. The Court was not convinced that the remarks complained of influenced the jury adversely to the rights of the defendants'.

---

[31]
Logie's Question II, brief, pp. 9-14; Diggs' Question I; brief, pp. 8-14.

The remarks involved at bar were made by the same prosecuting attorney in a similar setting, and they bear a close resemblance to those considered by the Court in the case of *DeLano*. We, therefore, respectfully submit that such authority is controlling.

No other method of working out this problem has been suggested other than to discuss each several statement or remark as restored to the context from which appellants have wrested it.[32]

1. The first group of such statements consist of those said by Logie's counsel to have been made 'solely for the purpose of giving the impression to the jury that counsel for the defendant was trying to conceal something'. See subdivisions (a), (b), (c), (d), and (e) of Logie's assignment of error No. 4 (271-273).

(a)

When the special prosecuting attorney was examining his first witness, Norman E. Philleo, clerk of the house of representatives (15), he produced and offered 12 large empty manila envelopes in which each juror might conveniently keep copies of exhibits (17-18).

Counsel for respondent Logie objected (17) to the offer as incompetent and unnecessary at that time, and the following transpired (17-18):

---

[32]

Not the least of our difficulties has been to find the record page on which each such remark appears, since it has not always been cited in appellants' briefs.

"**Mr. Sigler:** It is done for the purpose of assisting the jury.

Mr. Black: We have no objection of assisting the jury in each and every way possible (17).

Mr. Sigler: *I take it you don't want them to know what the facts are.*

Mr. Black: I take exception to that remark of Mr. Sigler.

The Court: Disregard it. Pay no attention to it.

Mr. Black: And I ask the court to instruct the jury—

The Court: I have already done so.

Mr. Black: I didn't hear you" (18).

Although counsel for appellant Diggs joins with counsel for appellant Logie in criticizing the italicized remark, he did not object to it at the time but stated that so far as he was concerned there was no objection to such use of the envelopes for the convenience of the jury.[33]

The remark of the prosecutor probably arose out of his natural irritation over counsel's captious objections to this use of the envelopes.

Be that as it may, however, defense counsel did not claim that the remark had resulted in a mistrial; and the court promptly instructed the jury to disregard it; indeed, the request for the instruction and the ruling itself crossed

---

[33] The fact that appellant Diggs is now represented by different counsel does not alter this fact.

each other. The objection was not renewed and counsel may not now complain.[34]

(b)

Counsel complain of the following isolated remark:

> "**Mr. Sigler:** Then why don't you sit down and let me go and we will be through".

We say it is isolated because, so far, we have not been able to find it in the printed record, and counsel do not cite the page in their briefs.

(c)

During the direct examination (32-54) of the witness Howell, he testified (39) that immediately following a conversation with Teen Daniels he had a discussion with Senator Logie in the senate chambers and he related the details. He then had a conversation with Senator Diggs on the floor of the senate and, he said (40):

> "**A.** The same day, yes. I saw them both just as soon as I could and told them what the situation was and what could be expected of them—" (interruption).

---

[34]

People v. Swartz, 118 Mich. 292; People v. Williams, 218 Mich. 486; People v. Nemeth, 258 Mich. 682; People v. Burnstein, 261 Mich. 584. These cases are authority for the rule that a verdict should not be set aside because of an improper remark of a prosecutor, where the court, on motion of the defense, instructs the jury to disregard it.

At this point, counsel for Logie interposed the following objection:

> "I object to that answer so far as the statement he told them what it was about and so on. This is important . . from the point of knowing the exact words, what was said by whom to whom".

The special prosecutor then made the remark to which counsel *now* object as prejudicial:

> *"We are trying to get it and if you will leave us alone until we have covered it—"* (40).

(d)

The next remark of the prosecutor to which counsel *now* object followed immediately after counsel for Logie had interrupted the prosecutor to exclaim: 'Just a moment!'. The remark was this:

> *"If counsel is going to object every time we try to say something. I am trying to cover this honestly and fairly as I know how"* (40).

Defendant's attorney at once disclaimed any intention of 'questioning counsel', stating he was merely 'asking for a ruling on the answer' of the witness.

Whereupon the prosecuting attorney withdrew the disputed answer and reframed his question to draw from the witness Howell 'what the conversation was with Senator Diggs', and the witness gave the following answer: 'Well, I told Senator Diggs the same story that I told Senator Logie' (40).

(e)

Counsel for Diggs then indicated that he was going to object to the answer, and the prosecutor said:

> *"These lawyers don't like it that way, you see"* (40).

Logie's counsel asked 'the privilege of taking exception to the remarks of counsel' and the court instructed the jury to 'strike it out and disregard it' (41).

That ended the episode.

Counsel do not state in their briefs precisely how these particular remarks could possibly have 'influenced the jury adversely to the rights of the defendants'. *People v. DeLano, supra.*

Logie's counsel had interposed many frivolous objections (32-40) to testimony adduced from the witness Howell and in this particular instance he had repeatedly interrupted both the witness and the prosecutor; and we respectfully submit the remarks were made in good faith. Moreover, the court upheld counsel's exception to the remarks and properly instructed the jury.

2. The remark numbered (f) in Logie's brief p. 10 was, we submit, a self-invited, perfectly justified retort made in the heat of trial, *People v. Burnstein*, 261 Mich. 534, 538. The prosecutor had inquired whether the senate's *sine die* adjournment was held up 'because of the bank bill, so-called'; and counsel for the defense, in objecting to the question (48), remarked:

> "The right way of proving that is by the records themselves".

The reply was:

> *"Perhaps some of us are not as smart as Mr. Black, and don't know how to prove these things"* (48).

Again, defense counsel having taken an exception, the court cautioned both the defense and the prosecution to 'go ahead and quit bantering back and forth'. We can see no prejudice here.

3. The next remark complained of is numbered 'g' in Logie's brief, p. 10, was made during cross-examination of Howell by counsel for Logie (56).

Counsel was inquiring of Howell concerning any fraternal relations he may have had with Logie and the witness had mentioned the EMTA (Eastern Michigan Tourist Association), 'The Shrine', and the Northeastern Michigan Development Bureau. Whereupon counsel asked Howell 'what kind of an organization 'The Shrine' was'. The witness replied that counsel should know, and counsel asked 'Do you know?'. Then came the remark to which an exception was taken:

> **"Mr. Sigler:** *The dramatics that my brother is putting in on this occasion".*

While defense counsel took exception to the remark, he did not request a ruling (56) but continued the interchange of repartee.

We respectfully submit that this instance should not result in a mistrial.[35]

---

[35] See People v. Watson, 307 Mich. 596, 606; and People v. Reading, 317 Mich. 616, 625.

4. Counsel next considered remarks numbered (h) and (i) in Logie's brief, pp. 10 and 11, contending that their sole purpose and effect 'was to insinuate that counsel for respondent was either attempting to conceal something on behalf of his client or to show something that was false'.[36]

(h)

During his cross-examination of the witness Howell (57-58), counsel for Logie inquired concerning business transactions that Howell had had with Logie. The witness requested counsel to clarify his questions, whether he was 'talking about the legislature or outside' and he finally said (58)

> "**A.** Oh, you are talking about business. You are talking about matters entirely apart from the legislature".

Counsel replied that he was 'asking the questions', and this was followed by the remark on which error is assigned:

> "**Mr. Sigler:** *Well, just a moment, my cantankerous brother—*"

The objection of the prosecutor was sustained before he made it, and counsel for Logie withdrew his question 'in order to clear the record'. No objection was made or exception taken to the remark. It should not be considered on appeal.[37]

---

[36]

We follow the course of argument set forth in the brief for appellant Logie.

[37]

Gillespie, Mich. Crim. Law and Procedure, Vol. 1, § 498, pp. 608-609, footnotes 16 and 17. People v. Frontera, 186 Mich. 343, 346; see also, People v. Nemer, 218 Mich. 163.

(i)

The prosecutor's remarks assigned as error under this number '(i)', were to the effect that Logie's counsel had not been accurate in framing his questions to Howell with respect to the contents of House Bill 22 (80-81). We think the criticism was justified.

During his cross-examination of Howell, counsel for Logie was inquiring (78) in relation to the witness' knowledge of the provisions of the bill and he asked:

> "Q. Did you know this new amendment provided for an annual appropriation of $20,000.00. Pardon me, I withdraw that, because I wish to connect it up another way" (78).

When the prosecutor asked if counsel was correcting his statement about the $20,000 appropriation, counsel gave no direct answer, though he finally stated he was referring to page 10 of the bill (79). But he continued to refer to provisions in the bill which, inter alia, appropriated $20,000 in the interest of agriculture in the upper peninsula.

Counsel then asked the following question which later became the subject of controversy between the prosecutor and himself:

> "Q. Did you know at that time that the original law provided prior to this amendment, provided for no appropriation from the state treasurer?" (79).

The witness replied he did not know.

The prosecutor then inquired (80):

> "Do you make that as an assertion, counsel?"

But counsel did not reply;[38] instead, he directed the witness' attention to the supposed fact that reference in the bill to appropriation was in large type, indicating 'that is amending the original act and new matter' (80)

Then:

> "**Mr. Sigler:** . . . I want to take exception to counsel's remark . . . about the original law, and appropriations therein, because on page 10, section 10 there are 13 lines stricken which have to do with the subject of money, $10,000 for the purpose of defraying necessary and legitimate expenses of the commission and providing that $20,000 shall be used each year to enhance the interest of agriculture at the upper peninsula state fair. So when I asked counsel if he was making as an assertion the statement he did and he didn't answer, I want that clear on the record.
>
> **Q.** And I have no objection to it, either.
>
> "**Mr. Sigler:** *Well, then, in the future I am going to ask that you reframe your questions accurately, and not misleading.*"

This was followed by colloquy on the same subject (80-81) in which, among other things, the prosecutor remarked that counsel was not fair with the witness and did not state accurately (81).

---

[38]

The record reads:

"Q. Do you know it now? A. No.

Mr. Sigler: Do you make that as an assertion, counsel?

A. No.

Q. You don't know it now? A. No".

The fair inference is that the answer 'No' which followed the prosecutor's question, was that of the witness rather than counsel.

A complete answer to the charge that such remarks jeopardized defendants' right to a fair trial, is that counsel, whether through honest mistake or deliberate intent, did *not* frame his question accurately, and that the question *was* unfair to the witness.

The law as it stood when House Bill 22 was introduced to amend certain of its sections, *did* provide what might be termed a continuing appropriation of $20,000 to enhance the interests of agriculture at the upper peninsula state fair.[39]

The prosecutor was well within his rights when he asked counsel whether his question about the content of the original law was an assertion; and he was also within his rights when he requested counsel to clear the record. We respectfully submit the remarks which followed were justified by the record.

(j)

Earlier in the cross-examination of Howell, the following occurred (65):

> "Q. But there is no question about the date and approximately the time you set?
>
> A. You mean the payment of five hundred dollars?
>
> Q. I mean just what I said.

---

[39]

Act No. 199, § 10, Pub. Acts 1933, Stat. Ann. § 18.950, provided among other things that $20,000 of moneys received by the racing commission under its provisions 'shall be used each year to enhance the interests of agriculture at the upper peninsula fair'. As amended by Act No. 360, Pub. Acts 1941, § 10 directed all such funds into the state treasury.

> **Mr. Sigler:** . . *I submit obstreperous manner of counsel is objectionable. Here is a witness apparently trying to find out what the lawyer is questioning him about and every time he does, he cockily says 'The record speaks for itself or something like that'.*
>
> **The Court:** I sustain the objection".

The cross-examination then proceeded. Counsel did not object to the remark. We respectfully submit the statement of the prosecutor was not prejudicial to the rights of the defendants, and that, in the absence of a request for a ruling, appellants may not now complain.

(k)

Finally, counsel complains of the remark (173):

> "Q. Why, my brother should learn some day that you have a right to test the credibility of a witness. If you will look at your books you will find that".

Counsel took no exception to the foregoing remark; he requested no ruling. Unlike the attorney in *People v. Neal*, 290 Mich. 123, he was not the victim of facetious judicial remarks or quips from the bench. He merely engaged in that form of colloquy with his opponent which any good trial lawyer must expect and endure.

> "Such colloquies between court and counsel (or, we may add between counsel themselves) are not unusual in the trial of causes, and especially in criminal cases, and the average juror knows it and understands it. He does not charge up against the client all the unpleasant things that may be said to counsel",
>
> *People v. Kimbrough*, 193 Mich. 330, 334.

(b)

Did the trial court abuse his discretion by permitting the special prosecuting attorney to heckle and harass respondents' counsel, and by unnecessarily hurrying respondents in the presentation of their case, and was the question timely and properly raised?[40]

Specifying some 14 instances, and citing the same authorities, counsel for each appellant argues something like this:—the trial judge never reprimanded the prosecutor for his prejudicial remarks, instead he continually told counsel to 'get along'; the total effect of this was to condone and, in the eyes of the jury, to approve the prosecutor's statements and remarks;—they repeat the oft asserted rule that a prosecutor is not a partisan who desires to win his case, but he is duty-bound 'to so conduct a trial that truth and justice are ultimately achieved' (he is not supposed to indulge in those 'fighting words' reserved to defense counsel); and when he is overcome with enthusiasm, it is the duty of the trial court to keep him within bounds.

Counsel then proceed to cite the remarks of the prosecutor on which error is assigned, but we find in the majority of instances that they merely repeat the remarks and statements of the prosecutor which they have already discussed under subdivision '(a)' of this First Question, *supra*, pp. 38-50. See, e. g., Logie's brief, pp. 23, 26, 27, 28, 29, 30 and 31.

Of the remaining claims of prejudice, we refer to a few:

---

[40]

Restating Logie's Question III, brief, pp. 14-35; Diggs' Question III, brief, pp. 28-40.

1. On page 27 of the Logie brief (Diggs' brief, p. 41), attention is directed to a remark of the prosecutor addressed to Logie's counsel:

> "**Mr. Sigler:** *Won't you come down some time and tell us how to try lawsuits?* (50).

No lawyer, whether prosecutor or defense counsel, would make such a 'teach-your-grandmother' remark unless greatly provoked, and, we submit, there was provocation here. We think the court was justified in calling the exchange between counsel: 'bantering back and forth'. Counsel for Logie replied in kind; he asked for no ruling; and each counsel stopped when ordered by the court.

2. A similar incident is mentioned on pages 28-29 of the Logie brief, page 42 of the Diggs' brief, where counsel assign error on the following remark of the prosecutor (69):

> *"If you will try your lawsuit, there won't be any argument".*

The record (69) reveals that Logie's counsel having drawn from the witness Howell an unfavorable answer to his question, [41] moved that it be stricken out; and that the court finally refused to do so, ruling that the answer was responsive (70). The intervening colloquy was harm-

---

[41]

Counsel showed the witness Exhibit 15, an illustrated bulletin issued by the EMTA and asked him if there was anything peculiar about a certain picture that made the bulletin different from many other bulletins that had been put out from time to time. The answer: 'No, I wouldn't say so. Maybe more art, more pictures. It hasn't got the picture of the slot machine that was there.'

less; [42] and counsel for the defense, if aggrieved, interposed no objection or exception to the prosecutor's remarks.

3. On page 30 of the Logie brief, page 43 of Diggs' brief, counsel complain of the following (153).

"**Mr. Black**: I am not asking any questions.

"**Mr. Sigler**: *I dont' care what you ask me. You are taking a lot of unnecessary time here.*

The Court: Let's get along".

This interchange of views occurred during the direct examination of Mrs. Logie, after the witness stated (153) she belonged to the Red Cross. The prosecutor objected on the ground that everybody belongs to something, and that it was all immaterial to the issue. The court admonished the prosecutor to 'get along', and not to 'waste a lot of time. We have gone awful slow this afternoon'. The prosecutor replied that 'we all contribute to the Red Cross and we do other things' (154); and the foregoing colloquy followed. Again, counsel for the defense made no complaint of the remarks of the prosecutor and if he deemed them harmful to his client he neglected to say so.

4. On page 31 of his brief, counsel for Logie complains of 'pertness on the part of the special prosecuting attorney' during the cross-examination of the witness Howell (69).

---

[42]

The interchange of remarks grew out of the witness' reference to slot machines, and counsel for defense invited the foregoing remark when he said: 'I don't want to spend my time arguing with counsel'.

Howell had testified (48-50) on direct examination that he met Logie at the annual meeting of the executives' committee of the EMTA held June 20 to 22, 1941 (51) at the Greenbush Inn near Oscoda and Au Sable. A summary of such testimony appears in our counter-statement of facts, ante pp. 9-10.

Counsel for Logie was cross-examining (68-69) this witness on that subject and he was inquiring about the purpose and object of the EMTA organization; he elicited the information that it had a secretary and he asked: 'He (the secretary) provides programs, provides bulletins and other advertising matter?' This brought forth the following:

"**Mr. Sigler:** It is all objected to, *what difference does it make, suppose they serve soda pop and play cards.*

The Court: Let's get along.

Mr. Sigler: They may have had doughnuts on one occasion.[43]

The Court: Go along, let's get along.

A. And answer the question?

The Court: Yes, answer".

Counsel did not object to the remark and he was allowed to proceed. We cannot imagine a reversal of conviction on so trivial a ground.

---

[43]

The quotation in counsel's brief ends here. It is important to note, since counsel complain that the court repeatedly urged the defense to 'get along' with the trial, and since they complain that they were unduly rushed in presenting their case, that in this particular instance, and in many others, it was the prosecutor who was urged to 'get along' and not waste time.

5. During direct examination of Logie (115-133), the witness testified (129) he came to the Greenbush gathering (see above) by auto rather than by train, and the prosecutor objecting, argued as follows:

> *"Now, what difference does that make. Suppose he went by bus or rode a bicycle. What difference does it make? It seems like we are taking a lot of unnecessary time.*
>
> **Q.** *Are you talking to me or to the court?*
>
> **The Court:** I will sustain the objection" (129).[44]

Again, counsel for the defendant interposed no exception but chose to 'argue back' rather than request a ruling.

The sum-total of all this, counsel argue, is that the defendants were denied their right to a trial 'conducted with a dignity befitting a court of record,' *People v. Tomczak,* 250 Mich. 679; that 'during the entire trial of the case the court at no time restrained the special prosecuting attorney in such conduct' as it was his duty to do; and that the court hurried the defense in the presentation of its case.

Where the record shows no exception to judicial remarks, counsel 'cannot be heard to complain in this Court for the first time',

People v. Shelters, 99 Mich. 333.[45]

---

[44]

Counsel assign no error on this ruling, so we may safely assume they realise that the testimony of Logie as to his means of transportation was wholly irrevelant.

[45]

And see authorities cited in our summary of the argument, ante pp. 31-32.

And this rule applies to remark of counsel,

People v. Burnstein, 261 Mich. 534.

But it is said the cumulative effect of the remarks of the prosecutor was to deny the defendants a fair trial. So assuming for the sake of argument, it is only fair that defense counsel when confronted by such a situation should be required to move the court to declare a mistrial; otherwise, counsel could lie in wait for error, speculate on the jury's verdict, husband their grievance and air it for the first time in a motion for a new trial,[46] or raise the question on appeal.

There is nothing in this record to indicate any discourtesies on the part of the trial judge, and if he at times urged counsel to 'get along with it', his criticism was leveled impartially against both prosecution and defense.

Neither *People v. Tomczak* nor *People v. Neal, supra,* control this question. In *Tomczak* the trial judge engaged in an exchange of facetious and derogatory remarks with counsel at the expense of the respondent; in *Neal,* the court indulged in 'pert remarks and quips from the bench' which proved exceedingly damaging to the party entitled to a fair trial. Neither of those situations were encountered here.[47]

---

[46] The question was not raised in the case at bar until motions for new trial were filed (233, 252).

[47] Nor can it be said, as counsel charge, that the court breached the canons of judicial ethics adopted by this Court.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 295

CHARLES C. DIGGS,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF MICHIGAN

Respondent

PETITION FOR REHEARING ON PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully requests a rehearing on the Petition for Writ of Certiorari heretofore filed by him, and suggests that consideration be given to the recent decision of this Court of January 5, 1948, *Sealfon* v. *United States,* 332 U. S. 575, which was not previously cited.

The criminal charge on which petitioner was convicted was that he, a state senator, conspired with others corruptly to affect and influence legislation (302). The statute of Michigan upon which such conspiracy charges are based states that:

> "Any person who shall commit any indictable offense at common law, for the punishment of which no pro-

vision is expressly made by any statute of this state, shall be guilty of a felony * * *."

Section 28.773, Mich. Stat. Ann. (Section 505, Mich. Penal Code).

Assuming the truth of the charge made, petitioner was guilty of receiving a bribe as a public officer, punishable by Sections 2.61 and 28.312, Mich. Stat. Ann., and was guilty of aiding and abetting others participating in the corruption of legislative action punishable by Section 28.979, Mich. Stat. Ann., which makes all accessories liable as principals.

Petitioner's contention is, therefore, that his acts being punishable under other statutes of the state cannot be subject to the prohibition of Section 505 of the Penal Code. This question was presented in petitioner's application for writ of certiorari but petitioner did not present, in support of his argument, the above mentioned case, *Sealfon* v. *United States*, 332 U. S. 575, which holds that on the principle of *res adjudicata* a defendant cannot first be charged with conspiracy to defraud and then later charged with the fraud which was the substantive offense of the conspiracy.

On the principle of that case, the conspiracy charge and the substantive charge were legally identical and petitioner should have been charged with bribery and aiding and abetting under Sections 2.61, 28.312 and 28.979. *Ipso facto*, Section 505 of the Penal Code was not applicable to him.

If no laws of Michigan defined the offense, petitioner's conviction was clearly without due process of law.

Stewart v. *Michigan*, 232 U. S. 665.

The *Sealfon* case first came to the attention of petitioner's counsel in October, 1948, after the petition for writ of certiorari was filed with this Court, when presented to a trial court in the State of Michigan as the basis for a motion to quash an indictment in somewhat similar circumstance.

Although that motion was denied it is now pending on appeal to the Supreme Court of Michigan. Petitioner believes the application of the rule thus laid down by this Court should be clarified in its relation to cases such as the one at bar.

Petitioner submits that this Court should reconsider his application for writ of certiorari.

GEORGE STONE,
Attorney for Petitioner,
2163 Penobscot Building,
Detroit 26, Michigan.

JAMES A. COBB,
613 F Street, N. W.,
Washington, D. C.,
Of Counsel.

Certificate of Counsel

Counsel for the above named petitioner, certify that the foregoing application is presented in good faith and not for the purpose of delay, and that such application is for the sole purpose of calling the attention of the court to its decision in *Sealfon* v. *United States*, 332 U. S. 575, which counsel believes to have important bearing upon the issue involved and which decision was previously overlooked by counsel.

GEORGE STONE,
JAMES A. COBB.